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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 477

AMERICAN PUBLIC POWER ASSOCIATION, THE CITY OF JAMESTOWN, NEW YORK, HANCOCK-WOOD ELECTRIC COOPERATIVE, INC., OF NORTH BALTIMORE, OHIO, AND NORTHWESTERN RURAL ELECTRIC COOPERATIVE ASSOCIATION, INC., OF CAMBRIDGE SPRINGS, PENNSYLVANIA, *Petitioners*

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The American Public Power Association, the City of Jamestown, New York, Hancock-Wood Electric Cooperative, Inc., of North Baltimore, Ohio, and Northwestern Rural Electric Cooperative, Inc., of Cambridge Springs, Pennsylvania, respectfully pray that a writ of certiorari issue to review the judgment of the

United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on June 20, 1957, which set aside an order of the Federal Power Commission.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (R. 47-75), dated June 20, 1957, are printed in the Appendix hereto (Appendix A, *infra*, pp. 1a-29a). They are not yet reported. The opinion of the Federal Power Commission and the order dismissing respondent's application for a license (R. 34-42) are printed in the Appendix hereto (Appendix B, *infra*, pp. 30a-39a). The Commission's order denying rehearing (R. 46) is also printed in the Appendix (Appendix C, *infra*, p. 40a).

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1957 (R. 76). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Was the Senate's reservation to the 1950 Niagara Treaty with Canada, which provided:

> "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States share of the waters of the Niagara River made available by the provisions of the treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress"

effective in withholding jurisdiction from the Federal Power Commission to issue a license under the Federal Power Act for the utilization of the additional flow made available by that Treaty for development in the United States?

2. Has the judgment of the Circuit Court of Appeals which denied effect to the Senate Reservation to the 1950 Treaty with Canada, and held the Federal Power Act applicable to the additional development of the Niagara River authorized by that Treaty, been rendered moot by the Act of August 21, 1957, authorizing issuance of a license to the New York Power Authority upon special terms and conditions not contained in the Federal Power Act; and, if so, should the judgment of the Circuit Court of Appeals be vacated, and the case remanded with instructions to dismiss as moot the Authority's petition for review of the Federal Power Commission order which declined jurisdiction under the Federal Power Act?

STATUTE AND TREATY INVOLVED

The 1950 Treaty between the United States and Canada is set forth at pp. 25-32 of the Record. (1 U.S.T. 694) The reservation is quoted, *supra*, in the "Questions Presented".

The Act of August 21, 1957, 71 Stat. 401, is reprinted as Appendix D, *infra*, p. 41a.

STATEMENT

On February 27, 1950, negotiators representing the United States and Canada signed a Treaty to provide for the beneficial use of the waters of the Niagara River and for the preservation and enhancement of the scenic values of the Niagara Falls and River. The

proposed Treaty increased the permissible flow of the Niagara River available to the United States and Canada for power purposes. This limit had been fixed, for each nation, as 20,000 cubic feet per second under the 1909 International Boundary Waters Treaty between the two governments, temporarily increased to 32,000 cubic feet per second by an exchange of notes in 1941. The average flow now available to the United States for power development is estimated as 65,000 cubic feet per second.

The flow available before the 1950 Treaty has long since been fully licensed under the Federal Power Act. These licenses are not affected by the Treaty. The controversy here relates only to the additional quantity made available by the Treaty.

The Treaty was transmitted to the Senate by the President on May 20, 1950. The President's message stated in part:

> ". . . All this treaty does is to make additional water legally available for power purposes in each of the two countries. This is a step which must be taken in the interest of the United States. It is one which should be left separate from the steps which must be taken in this country in order to convert this water into additional power." (Senate Executive N, 81st Cong., 2d Sess. (1950).)

After holding hearings, the Senate Committee on Foreign Relations favorably reported the Treaty, provided that the Senate condition its consent to the Treaty upon the adoption of the following reservation:

> "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit of

the United States share of the waters of the Niagara River made available by the provisions of the Treaty and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress."

The Committee Report explained the reasons for the reservation as follows:

"'The committee is aware that much of the treaty cannot be put into effect without implementing legislation. Nevertheless, in order to relieve the acute power shortage in Canada, it considers action should be taken first on the treaty without reference to any implementing legislation. The committee therefore makes its recommendation for advice and consent to the ratification of the treaty without any reflection on any implementing legislation now before the Congress or to be presented to the Congress in the future. It is the committee's view that any legislation must be gone into carefully and measured in terms of the interests of the people of the United States. This will in all probability require public hearings and should not be permitted to delay ratification of the treaty. * * *'" (S. Exec. Rep. No. 11, 81st Cong., 2d Sess., 6-7 (1950).)

The Report noted that:

". . . without the reservation the redevelopment for power purposes would be governed by the Federal Power Act. The committee intends by the reservation to retain that power in the hands of Co ress." (p. 7.)

On August 9, 1950, the Senate gave its consent to the Treaty only after adopting the Committee reservation (96 Gong. Rec. 12094).

The President made no request that the Senate reconsider the reservation. Instead, on August 17, 1950, the State Department officially notified the Canadian Government that Canadian acceptance of the reservation was necessary before the United States could agree to final ratification. This notification stated in part:

> "Any ratification of the treaty by the President of the United States will, of necessity, be made subject to the reservation required by the Senate resolution. *Before the treaty is ratified on the part of the United States it is desirable that this notification with respect to the reservation be communicated to your Government and that my Government be notified whether that reservation is acceptable to the Canadian Government.. In the event the reservation is acceptable, the Department of State will undertake promptly, upon the receipt of notification to that effect, to complete arrangements for the issuance by the President of his ratification of the treaty and for transmittal of the ratification to the American Embassy at Ottawa with a view to the exchange of instruments of ratification as provided for in Article X of the treaty.*
>
> "It is assumed that, in accordance with the customary practice in such cases, there will be signed on the occasion of the exchange of ratifications a protocol which, without constituting a new agreement between the Governments, will serve as formal evidence of the exchange. In this connection, *my Government considers it necessary for the protocol of exchange to contain a statement indicating that the United States ratification is subject to the above-mentioned reservation and that the reservation is acceptable to the Canadian Government.*" (Letter dated August 17, 1950, to W. D. Matthews, Charge d'Affaires ad interim of

Canada in Washington, from Adrian S. Fisher, Legal Adviser of the Department of State.) (Emphasis supplied.)

On August 24, 1950, the President ratified the Treaty subject to the reservation for the United States.

On September 21, 1950, the Canadian Ambassador officially replied to the United States Secretary of State:

> "The terms of this reservation were forwarded to the Canadian Government, and *I am now instructed to advise you that the Canadian Government accepts the United States reservation.* The Canadian Government agrees with your suggestion that its acceptance of the reservation be indicated by a statement to be included in the Protocol of exchange of ratifications." (Emphasis supplied.)

The Canadian Government subsequently ratified the Treaty on October 5, 1950. The formal exchange of ratifications took place in Ottawa on October 10, 1950, and was recorded in a "Protocol of Exchange" (Canada Treaty Series, 1950; No. 3, p. 14) in which the existing joint agreement on the reservation was stated. Thereafter, the Treaty, including the reservation, was announced by the President of the United States by formal proclamation. In accordance with the provisions of Article X, the Treaty entered into force on October 10, 1950.*

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* In 1929 a proposed treaty had been signed between the United States and Canada to permit increased diversions for power purposes by a designated licensee under the terms of the Federal Power Act, coupled with scenic improvements to the Falls area. The President transmitted it to the Senate for its advice and consent. The Treaty died in the Senate (*Foreign Relations of the United States*, 1936, Vol. I, pp. 834-836).

On August 20, 1956, the Power Authority of the State of New York, a corporate municipal instrumentality of the State of New York, made application to the Federal Power Commission for a license under Section 4(e) of the Federal Power Act to construct a power project to utilize all of the United States share of the increased waters of the Niagara River covered by the 1950 Treaty. The Power Authority attacked the reservation precluding the Federal Power Commission from extending its jurisdiction to the new waters covered by the Treaty, contending that it was never validly a part of the treaty, and was unconstitutional. The Federal Power Commission granted petitions to intervene, including those of the present petitioners.

The Commission's Opinion and Order dismissing the respondent's application for a license issued on November 30, 1956. The Commission found it clear:

> "... that the purpose of the reservation was to require further action by Congress prior to redevelopment of the power site at Niagara Falls. ... it is entirely authoritative with us as 'the supreme Law of the Land' under Article VI of the Constitution."

and held:

> "We are without authority to issue a license for the redevelopment (Project No. 2216) proposed by the Power Authority of the State of New York." (R. 37-39).

A petition for rehearing was denied on January 2, 1957.

The New York Power Authority petitioned the Court of Appeals for the District of Columbia Circuit

to review the order of the Federal Power Commission (R. 1-7). The present petitioners intervened.

By a divided decision, two to one, the Court of Appeals reversed the Federal Power Commission, holding that the reservation was merely "an expression of the Senate's desires and not a part of the Treaty." (R. 56; *infra*, 10a). The dissenting opinion significantly pointed out the implication, in the majority opinion, "that this reservation, if a part of the treaty, would be invalid." (R. 64; *infra*, 18a). The majority, however, expressly disavowed that they were deciding this constitutional question.

Excluding all of the authorities cited by the majority which could only be relevant if in truth the constitutional validity of the reservation were in issue, it appears that the decision below rests upon a conclusion (a) that the reservation was not a part of the Treaty because never validly accepted by Canada, the Canadian Parliament never having acted upon it, despite the formal acceptance of the reservation by the Canadian Government; and (b) that since the Senate and President knew in proposing the reservation that it was of domestic concern, they did not intend for the reservation to become a part of the Treaty. The Court said:

> "A party to a treaty may presumably attach to it a matter of purely municipal application, neither affecting nor intended to affect the other party. But such matter does not become a part of the treaty." (R. 53; *infra*, 7a)

Accordingly, the court below in its decision of June 20, 1957, set aside the order of the Federal Power Commission and ordered the case remanded to the

Commission for proceedings under the Federal Power Act.

After the decision of the Court of Appeals below, and after the time within which that court had jurisdiction to vacate its Judgment, but within the period available for filing of a petition for certiorari in this Court, Congress passed H.R. 8643, which was signed by the President on August 21, 1957 (Public Law No. 85-159; 71 Stat. 401; Appendix D).

The Act of August 21, 1957, expressly authorizes and directs the Federal Power Commission to issue a license to the Power Authority of the State of New York, subject to various licensing conditions in addition to those required under the Federal Power Act. These additional conditions require the Authority, in disposing of power, to give preference to municipal and other public power agencies; require a portion of the power to be made available for use in states other than New York; require the power licensee to contribute to the scenic enhancement of the area provided for by the 1950 Treaty, at a cost of $15,000,000; require the Power Authority, as licensee, to pay for the United States share of the cost of the construction of the "remedial works" undertaken in accordance with the Treaty, whenever such remedial works are constructed; and so on.

These petitioners objected to the issuance of a license under the Federal Power Act, which the judgment below would compel, absent the conditions which the 1957 legislation has superimposed. They do not object to the issuance of a license if it contains these

conditions and if the Power Authority can lawfully accept them (a question not before the court). They believe that the judgment below is of grave importance, is wrong on the merits, has probably, although not certainly, been rendered moot by the 1957 legislation, enacted after its entry, and should be vacated on certiorari.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS BELOW IN HOLDING THAT THE "RESERVATION" TO THE 1950 NIAGARA TREATY ADOPTED BY THE SENATE, INCLUDED IN THE TREATY AS RATIFIED BY THE PRESIDENT AND ACCEPTED BY CANADA, IS NOT A VALID PART OF THE TREATY, HAS DECIDED AN IMPORTANT QUESTION OF THE PRESIDENT'S AND SENATE'S TREATY-MAKING POWER, WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

This is believed to be the first time that a "reservation" by the Senate in giving advice and consent to the ratification of any treaty has ever been invalidated by any court or authority in the United States.*

The court below rejected the reservation on the ground that it was merely an "expression of the Senate's desires and not a part of the Treaty." (R. 56; *infra*, p. 10a). But if the procedure followed by the Senate and President in adopting the Niagara reservation is not sufficient to qualify that reservation as an integral part of the Treaty, then it is difficult to perceive how the Senate and President could propose any reservation or amendment to a treaty, once negotiated, that could ever be made effective.

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* See Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 Col. L.R. 1151 (1956).

As noted by Mr. Corwin,* the Senate in performing its treaty function has several options:

> ". . . It may consent unconditionally to a proposed treaty, or it may refuse its consent, or it may stipulate conditions in the form of amendments to the treaty or of reservations to the act of ratification, the difference between the two being that, whereas amendments, if accepted by the President and the other party or parties to the Treaty, change it for all parties, reservations limit only the obligations of the United States thereunder."

The President made no request that the Senate reconsider the reservation and in no way indicated that he thought the reservation illegal or unwise:

> ". . . the President may, if dissatisfied with amendments which have been affixed by the Senate to a proposed treaty or with the conditions stipulated by it to ratification, decide to abandon the negotiations, which he is entirely free to do." (Corwin, *The Constitution of the United States of America*, S. Doc. 170, 82nd Cong., 2d Sess., p. 413 (1953).)

Instead, a clear notification was sent to the Canadian government that the United States ratification of the Treaty was conditioned upon the acceptance by Canada of the reservation. The President's unilateral ratification of the Treaty on August 24, 1950, prior to the acceptance by Canada, is no indication, (contrary to what the court below said), that the reservation can be disregarded, because (a) the President's ratification

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* Edwin S. Corwin, *The Constitution of the United States of America*, S. Doc. No. 170, 82d Cong., 2d Sess., p. 413 (1953).

incorporated the reservation, and (b) the important act, as stated in the State Department notification is the "exchange of instruments of ratification as provided for in Article X of the treaty". (R. 30) The exchange of ratifications took place on October 10, 1950, *after* the official Canadian note of acceptance to the United States of September 21, 1950. The reservation was formally recorded in the "Protocol of Exchange" and announced as part of the Treaty by the President in his formal proclamation.

The only case cited by the majority below, *New York Indians* v. *United States*, 170 U.S. 1 (1898) is clearly distinguishable. There one of several Senate "provisos" to an Indian treaty was held inoperative by the Court because it was not included in the original or in the published copy of the treaty or in the President's proclamation and did not appear to have been called to the attention of the tribes, who would "naturally assume that the treaty, embodied in the presidential proclamation, contained all the terms of the arrangement." (p. 23) The Court there noted (p. 22) that: "This is the more remarkable, as every other amendment made by the Senate appears in the treaty as published, while no reference whatever is made to this . . ." These "other amendments" were given legal effect by the Court as part of the treaty.

A case not cited by the majority below, but applicable here, is oft-cited *Doe* v. *Braden*, 16 How. 635 (U.S. 1853), where this Court held:

> "[I]t is too plain for argument that where one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or adding

> a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged—the declaration thus annexed is a part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged." (p. 656).

The conclusion of the court below that the reservation was not a part of the Treaty because never ratified *per se* by the Canadian Parliament raises serious questions of Canadian, as well as international law.* If courts of one country may go behind the Executive's formal protocol of exchange of ratifications to ferret out the foreign procedural requirements of the other, pass upon their performance, and ascertain portions of the treaty deemed not in accord with the domestic law of that foreign country, then a kaleidoscope of perplexing international problems may be posed (*United States* v. *Pink*, 315 U.S. 203, 233 (1942), *Underhill* v *Fernandez*, 168 U.S. 250, 252 (1897)). Who can say, for example, what concurrence the ruler of an Arab state must obtain from his council of chieftains to validate his acceptance of an American Senate treaty reservation? This is the President's responsibility, not the Court's. As far as United States courts are concerned, the Proclamation of the Treaty by the President is conclusive that the reserva-

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* Canada has made no contention that the reservation is not "part" of the Treaty. Canada may well be estopped from ever asserting that the reservation was not validly accepted by her, for she had an interest in having the Treaty in a form which would facilitate its acceptance by the United States Senate, and her action permitted acceptance of the whole Treaty by the United States to the benefit of Canada.

tion is part of the Treaty. Neither the courts nor an administrative agency may properly impeach the President's political judgment as to what terms and conditions were adopted as integral parts of the treaty. *United States* v. *Reid*, 73 F. 2d 153, 156 (9th Cir. 1934); *cf. Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1917).

If the decision below rests upon a holding that the reservation is not part of the treaty because it concerned only domestic matters,* then a serious limitation is placed on the Senate's and President's traditional** treaty-making powers. It has long been es-

* This would seem to clearly pose the "constitutional question" of the validity of such a reservation which the court stated it declined to decide, for it rests on the assumption that there is something inherently defective due to the *nature* of the reservation, which has little to do with whether the objective words contained in the reservation clause were or were not in fact adopted as part of the final treaty. The only "inherent defect" could be some superior prohibition, i.e., the Constitution.

** Reservations to treaties in order to condition their operation as domestic statutes are not uncommon. The Mexican Water Treaty (U.S. Treaty Series, 994, 59 Stat. 1219 (1945)) between the United States and Mexico, affecting the Colorado, Rio Grande and Tia Juana Rivers, contains eleven Senate reservations in some detail which prevented the self-executing provisions of the treaty from going into effect until Congress so legislated. This Treaty was featured in the arguments of the present case, both before the Commission and the Court of Appeals, in which the Power Authority directly argued that the Mexican Water Treaty reservations were invalid. Some examples of reservations, "understandings" or "agreements" attached by the Senate to other treaties which would be similarly affected: *Statute (Treaty) of the International Atomic Energy Agency* (any amendments to treaty must be submitted to Senate for advice and consent, and the United States will withdraw if any amendment adopted later fails of Senate approval. A further reservation denying the availability of fissionable material in the absence of Congressional action

tablished that United States treaties, under the Constitution, may have a dual effect of international agree-

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was defeated by a vote of 55-31. See 103 Cong. Rec. pp. 8447-68, 8491-8534, June 18, 1957); *Mutual Defense Treaty with China, 1955* (applicable only in event of external attack); *Geneva Convention for Protection of War Victims, 1955* (right to use Red Cross emblem, impose death penalty regardless of local law); *Convention of Intergovernmental Maritime Consultative Organization, 1950* (nothing to affect domestic antitrust or commercial law); *Charter of Organization of American States, 1950* (nothing to enlarge or limit laws and rights of the states of the United States under the Constitution); *Friendship, Navigation and Commercial Treaties of 1953 with Israel, Denmark, Greece and Japan* (no professional person may practice without meeting the requirements of state laws). See also *International Boundary Water Treaty with Canada, 1909* (nothing should affect territorial or riparian rights in St. Mary's River); *Commercial Treaty with Japan, 1911* (no constructive repeal of Act of February 20, 1907, regulating immigration of aliens—see to same effect *Treaty with Germany, 1923*); *Treaty with Colombia, 1914* (free passage for Colombian troops and warships through Panama Canal not applicable in case of war between Colombia and any other country); *Treaty of friendship with Austria, 1921* (U.S. not to be represented or to participate in any group in which U.S. authorized to participate under treaty until a Congressional act should so provide); *Treaty of friendship, commerce and consular rights with Austria, 1928* (termination of prohibitions against shipping discrimination reserved); *Sockeye salmon convention with Canada, 1930* (no fishing gear contrary to laws of Washington and Canada to be authorized by Fisheries Commission); *Extradition Treaty with Costa Rica, 1922* (no person to be extradited upon whom death penalty can be inflicted in U.S. for offense charged, insisted upon by Costa Rica—see same provision in *Treaty with Portugal, 1908*); *Reciprocal military service convention with Great Britain, 1918* (exemption of American citizens in Great Britain if in exempt age groups under American law); *General Act of Algeciras, 1908* (affecting Morocco—only U.S. purpose to promote comity and interests of its citizens, not to participate in foreign political questions); *Revision of General Acts of Berlin and Brussels, 1919* (disputes to be submitted to court of arbitration under Hague Convention. In consenting to Hague Convention of 1907, the Senate inserted a reservation that recourse to

ment and self-executing domestic law.* Chief Justice Marshall in the leading case of *Foster* v. *Neilson*, 2 Pet. 253, 314 (U.S. 1829), distinguished treaties which are self-executing from those which are not, as follows:

> "A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> "In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be

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the Permanent Court "can be had only by agreement thereto through general or special treaties" which must of course go to the Senate prior to ratification); *London Naval Treaty, 1930* (consent subject to firm understanding there were no secret documents or agreements modifying treaty provisions); *Brussels convention on uniform rules for bills of lading covering carriage of goods by sea, 1924* (monetary values in bills of lading subject to Congressional act. The President waited until 1936, when Congress passed the act in question, before ratifying. When possible conflict between the act and convention then appeared the Senate stipulated the act should prevail); *Treaty of 1854 with Britain concerning Canada* (effect on domestic revenue laws—to same effect, *Treaty of 1875 with Hawaii*). See generally, V HACKWORTH, INTERNATIONAL LAW (1940), pp. 101-153; Corwin, *Constitution of the United States*, S. Doc. 170, 82d Cong., 2d Sess., p. 413 (1953); Henkin, *The Treaty Makers and the Law Makers*, 56 Col. L. R. 1151, 1169-1181 (1956); MILLER, RESERVATIONS TO TREATIES (1919).

* Parliamentary legislation is required in Britain and Canada to make a treaty effective as domestic law, notwithstanding its self-executing terms, whereas in the United States a treaty is immediately effective as domestic or internal law throughout the land. See Deutsch, *Eminent Domain Under a Treaty*, 43 A.B.A. Journal 699, 701 (1957). The Senate reservation would accomplish the same result for the United States on the Niagara Treaty as was automatic in Canada.

regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."

The distinction was further reiterated by Justice Field for the Court in *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888):

"... A Treaty is primarily a contract between two or more independent Nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. *When the stipulations are not self executing they can only be enforced pursuant to legislation to carry them into effect*, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. *If the Treaty contains stipulations which are self executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.*" (Emphasis supplied.)

See also *Edye* v. *Robertson*, 112 U.S. 580, 598 (1884); *Cook* v. *United States*, 288 U.S. 102, 118-119 (1933).

The question is not involved here as to whether, by reservation to a treaty, the Senate may substantially amend or repeal a domestic statute, theretofore operative as to international waters, so as to make it inoperative thereafter. Instead, the question is whether, by reservation, the Senate may suspend the implied extension of an existing statute to a *new*

subject matter created by the treaty to which the reservation is annexed. The Senate reservation preserved the *status quo;* it made no new domestic law, but reserved that function to Congress. This was a salutary example of the proper use of a reservation. The opinion below denies the Senate that option. Legislation, it implies, must precede or accompany the treaty: a reservation cannot prevent the self-executing effect of the treaty as domestic law.

Professor Henkin has aptly put the matter as follows:

> "Now we are told that because it did not choose to delay the treaty, the Senate failed to make its desired condition effective and the treaty is law despite the Senate. It is not difficult to guess what the Senate would do the next time if the views of the Authority prevailed. Exactly whose interests or what purpose would be served by requiring the Senate thus to delay ratification is difficult to conceive."
> (Henkin, *supra,* note p. 11 at p. 1182)

2. THE JUDGMENT BELOW HAS PROBABLY BEEN RENDERED MOOT BY THE ACT OF AUGUST 21, 1957, AND, IF SO, THE ESTABLISHED PRACTICE IS TO REVERSE OR VACATE THE JUDGMENT BELOW, AND REMAND WITH A DIRECTION TO DISMISS

A. As to whether the 1957 statute has rendered the judgment below moot:

The function of the 1950 Treaty reservation, if given full effect, was to reserve to Congress the opportunity to enact special legislation governing utilization of the additional flow of the Niagara River. Despite the judgment below, denying effect to that objective, the Congress, during the ninety-day period available for petition to this Court for review of that judgment, has

exercised that right and has enacted special Niagara legislation, superimposed on the structure of the Federal Power Act. The question of whether the Treaty reservation could or could not validly preclude proceedings under the Federal Power Act is thus probably rendered moot. We say "probably" because the 1957 act is not plainly exclusive, and requires action from the Authority which it has said in other proceedings before the Federal Power Commission would be ultra vires. Specifically, we refer to the obligations stated in the new act to recognize preference rights in public agencies, and to recognize the rights of other states to a share of Niagara power: commitments which the Authority has in the past denied could be undertaken under its own charter.

B. If rendered moot by the 1957 act, the judgment below should be reversed or vacated and the case remanded to the Court of Appeals with instructions to dismiss the petition for review

Unless reversed or vacated, the judgment below is res judicata that a Senate reservation was ineffective to accomplish its purpose. It is not right that these petitioners be left in the position of having their claims to the protection of the Senate reservation adjudicated adversely to them, and then be precluded from obtaining review of that judgment solely in consequence of enactment of the very statute designed to occupy the field reserved by the Senate reservation, but which may or may not accomplish that purpose, depending upon future events. The public importance of the question decided adversely below adds emphasis to the problem.

The Court has evolved a practice which disposes of such cases.

Where a case has become moot after the judgment below, the "established practice" is to "dispose of the case, not merely of the appellate proceedings which brought it here," and, to do so, "to reverse the judgment below with directions to dismiss the bill, complaint or petition." *Brownlow* v. *Schwartz*, 261 U.S. 216, 218 (1923), citing cases. Substantially the same phraseology appears in *United States* v. *Anchor Coal Co.*,* 279 U.S. 812 (1929).

In *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), it was held that a judgment which had become moot was nevertheless res judicata. Mr. Justice Douglas said, for the Court (p. 39):

> ". . . If there is hardship in this case it was preventable. The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in Duke Power Co. v. Greenwood County, 299 U.S. 259, 267, 81 L. ed. 178, 18[illegible] 57 S. Ct. 202, to be 'the duty of the appellate court.' "

A footnote (p. 39) states that "this has become the standard disposition in federal civil cases," citing thirty-two cases. Later cases conform to the same practice, e.g., *McKay* v. *Clackamas County*, 349 U.S. 909 (1955); *Garcia* v. *Landon*, 348 U.S. 866 (1954).

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* Where the case has become moot, after the judgment below but before this Court has taken jurisdiction, there is, of course, no necessity to dispose "of the appellate proceedings which brought it here" because it is not yet here, but on principle, there is just as strong necessity to "dispose of the cause, not merely of the appellate proceedings. . . ." In either event the lower court's judgment, though moot, is res judicata unless reversed.

The rule has been applied in cases rendered moot by legislation, e.g., *United States* v. *Alaska S. S. Co.*, 253 U.S. 113, 116 (1920); *Board of Public Utility Commissioners* v. *Compania General de Tabacos*, 249 U.S. 425 (1919); *Bryan* v. *Austin*, — U.S. —, 1 L. ed. 2d 1527 (1957).*

These reasons for vacating an adjudication which has been rendered moot by legislation apply with particular force to a case of the public importance and gravity of this one.

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* See Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1. Professor Scott concludes (p. 16): "In situations like this where the controversy has become moot before the appellate court has made its decision, it would seem that the better practice is not merely to dismiss the appeal, but to dismiss the suit or direct the lower court to do so. The result then clearly is that the matter will not be res judicata, since there is no judgment on the merits."

See also the annotation appearing at page 42, 95 L. ed.; *cf. South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892); *Leader* v. *Apex Hosiery Co.*, 108 F. 2d 71 (3rd Cir. 1939), aff'd. 310 U.S. 469 (1940).

CONCLUSION

The judgment below is wrong, we respectfully maintain, and it ought to be reversed on the merits. If review of such an important decision on the merits is not available because of enactment of legislation which may have rendered the judgment moot, then it ought to be vacated upon that ground. For these reasons, we believe that this petition for certiorari should be granted.

Respectfully submitted,

NORTHCUTT ELY,
Attorney for Petitioners

September 18, 1957

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Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No 13652

POWER AUTHORITY OF THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ONEIDA MADISON ELECTRIC COOPERATIVE, et al., Rural Electric Distribution Cooperatives), PEOPLE OF THE STATE OF NEW YORK, ROCHESTER GAS AND ELECTRIC CORPORATION, AMERICAN PUBLIC POWER ASSOCIATION, and the CITY OF JAMESTOWN, NEW YORK, INTERVENORS

On Petition to review an order of the Federal Power Commission

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Decided June 20, 1957

Mr. Philip C. Jessup, with whom *Mr. Thomas F. Moore, Jr.*, was on the brief, for petitioner.

Mr. Willard W. Gatchell, General Counsel, Federal Power Commission, with whom *Messrs. John C. Mason*, Deputy General Counsel, Federal Power Commission, and *Joseph B. Hobbs*, Attorney, Federal Power Commission, were on the brief, for respondent. *Mr. Howard E. Wahrenbrock*, Assistant General Counsel, Federal Power Commission, also entered an appearance for respondent.

Mr. John Davison, a member of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, for intervenor, People of the State of New York.

Mr. Henry H. Fowler also entered an appearance for intervenor, People of the State of New York.

Mr. Lawrence Potamkin was on the brief for intervenor, Oneida Madison Electric Cooperative, Inc., and certain other intervenors.

Mr. T. Carl Nixon was on the brief for intervenor, Rochester Gas and Electric Corporation.

Messrs. Northcutt Ely, Robert L. McCarty, C. Emerson Duncan II, and *Charles F. Wheatley, Jr.*, were on the brief for intervenors, American Public Power Association, and the City of Jamestown, New York.

Before EDGERTON, Chief Judge, and BAZELON and BASTIAN, Circuit Judges.

BAZELON, *Circuit Judge:* Petitioner, an agency of the State of New York, applied to the Federal Power Commission for a license to construct a power project to utilize all of the Niagara River water which, under the 1950 treaty between the United States and Canada,[1] is available for American exploitation.

In consenting to the treaty, the Senate had attached the following "reservation":

> "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States share of the waters of the Niagara River made available by the provisions of the treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress. [1 U.S.T. 694, 699.]"

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[1] Treaty Between the United States and Canada Concerning Uses of the Waters of the Niagara River, Feb. 27, 1950, 1 U.S.T. 694.

The Commission dismissed petitioner's application on November 30, 1956, in an opinion and order declaring:

> In the absence of the treaty reservation we would act on the Power Authority's application in accordance with the provisions of the Federal Power Act. But if we are to accept the injunction of the reservation as it stands, we would have no authority to consider the application of the Power Authority on its merits.
>
> * * *
>
> Since the resrvation here was intended by the Senate as part of the treaty and was intended to prevent our jurisdiction attaching to the water made available by the treaty, it is entirely authoritative with us as the Supreme Law of the Land under Article VI of the Constitution. . . .
>
> * * *
>
> We are without authority to issue a license for the redevelopment (Project No. 2216) proposed by the Power Authority of the State of New York.

An application for rehearing was denied on January 2, 1957, and petitioner brought this review proceeding.

The parties agree that, if the reservation to the 1950 treaty is not "Law of the Land," the order should be set aside. Since the reservation did not have the concurrence of the House of Representatives, it is not "Law of the Land" by way of legislation.[2] The question is whether it became "Law of the Land" as part of the treaty.

The Commission argues that the reservation is an effective part of the treaty because: (1) it was a condition of the Senate's consent to the ratification of the treaty; (2) the condition was sanctioned by the President, was "accepted" by Canada, and was included in the exchange of ratifications; and (3) it "thus became a part of the

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[2] *New York Indians* v. *United States*, 170 U.S. 1, 23 (1898); *Fourteen Diamond Rings* v. *United States*, 183 U.S. 176, 184 (1901), concurring opinion of Mr. Justice Brown.

Treaty." Simple as this argument seems, we cannot agree with it.

The treaty was signed on behalf of the United States and Canada on February 27, 1950. It defined the quantity of Niagara River water which was to be available for power purposes and provided that it "shall be divided equally between the United States of America and Canada." How each party was to exploit its share of the water was left for that party to decide.

In transmitting the treaty to the Senate on May 2, 1950, the President pointed out that the treaty did not determine how the United States was to exploit its share of the water. He said:

> . . . It is a question which we in the United States must settle under our own procedures and laws. It would not be appropriate either for this country or for Canada to require that an international agreement between them contain the solution of what is entirely a domestic problem.[3]

The Foreign Relations Committee of the Senate agreed that the question was "domestic in nature" and "concerns the United States constitutional process alone." It recommended the reservation because, without it, "the redevelopment for power purposes would be governed by the Federal Power Act. The Committee intends by the reservation to retain that power in the hands of Congress."[4] The Senate accepted the Committee's recommendation and consented to the ratification of the treaty with the reservation on August 9, 1950.[5]

Meanwhile, the Canadian Parliament had approved the treaty as signed, without the reservation. In a note on August 17, 1950, the Legal Advisor of the Department

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[3] SENATE EXECUTIVE N, 81st Cong., 2d Sess. 3.

[4] S. EXEC. REP. NO. 11, 81st Cong., 2d Sess. 7.

[5] 96 CONG. REC. 12095.

of State called the attention of the Canadian Government to the Senate action, saying:

> It appears that, while recognizing the subject matter of the reservation as domestic in nature and concerning the United States constitutional process alone, the Senate considered the reservation necessary in order to make certain that implementation of the treaty on the part of the United States would be made only by specifically authorized acts of Congress and would not be governed by the Federal Power Act.

A week later, without waiting for Canadian reaction to the reservation, the President ratified the treaty subject to the reservation. On September 21, 1950, the Canadian Ambassador, replying to the State Department's note, advised that his government accepted the reservation and would indicate its acceptance "by a statement to be included in the Protocol of exchange of ratifications." Two weeks later, without resubmitting the treaty to Parliament for approval of the reservation, the Canadian Government ratified the treaty. In the Protocol, on October 10, 1950, Canada inserted the following statement:

> Canada accepts the above-mentioned reservation because its provisions relate only to the internal application of the Treaty within the United States and do not affect Canada's rights or obligations under the Treaty.

The Canadian view that the reservation was of purely domestic concern to the United States and of no concern to Canada was shared, as we have shown, by the President, the Department of State and the Senate.

Unquestionably the Senate may condition its consent to a treaty upon a variation of its terms. The effect of such a "consent," by analogy to contract law, is to reject the offered treaty and to propose the variation as a counter-offer which will become a binding agreement

only if accepted by the other party.[6] But, if what the Senate seeks to add was implicit in the original offer, the purported "conditional acceptance" is an acceptance and the contract arises without a further acceptance by the other party being required. RESTATEMENT, CONTRACTS § 60, comment a (1932). The disposition of the United States share of the water covered by this treaty was, even apart from the reservation, something "which we in the United States must settle under our own procedures and laws." The reservation, therefore, made no change in the treaty. It was merely an expression of domestic policy which the Senate attached to its consent. It was not a counter-offer requiring Canadian acceptance before the treaty could become effective. That Canada did "accept" the reservation does not change its character. The Canadian acceptance, moreover, was not so much an acceptance as a disclaimer of interest. It is of some significance in this regard that the Canadian Government, although it had submitted the original treaty to the Parliament for its approval, found it unnecessary to resubmit the treaty to Parliament after the reservation was inserted. Also significant is the fact that the President ratified the treaty with the reservation without even waiting for Canada to "accept."

A true reservation which becomes a part of a treaty is one which alters "the effect of the treaty in so far as it may apply in the relations of [the] State with the other State or States which may be parties to the treaty." *Report of the Harvard Research in International Law*, 29 AM.J. INT'L L. Supp. 843, 857 (1935). It creates "a different relationship between" the parties and varies "the obligations of the party proposing it . . . ." 2 Hyde, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND AP-

[6] "A reservation is upon analysis the refusal of an offer and the making of a fresh offer." I Oppenheim, INTERNATIONAL LAW (8th ed., Lauterpacht, 1955) 914.

PLIED BY THE UNITED STATES (2d revised ed. 1945) 1435; International Law Commission, 2d Sess., Report on the Law of Treaties by J. N. Brierly, U.N.Doc. A/CN. 4/23, 14 April 1950, pp. 41, 42-43. The purported reservation to the 1950 treaty makes no change in the relationship between the United States and Canada under the treaty and has nothing at all to do with the rights or obligations of either party. To the extent here relevant, the treaty was wholly executed on its effective date. Each party became entitled to divert its half of the agreed quantum of water. Neither party had any interest in how the share of the other would be exploited, nor any obligation to the other as to how it would exploit its own share. The Senate could, of course, have attached to its consent a reservation to the effect that the rights and obligations of the signatory parties should not arise until the passage of an act of Congress. Such a reservation, if accepted by Canada, would have made the treaty executory. But the Senate did not seek to make the treaty executory. By the terms of its consent, the rights and obligations of both countries arose at once on the effective date of the treaty. All that the Senate sought to make executory was the purely municipal matter of how the American share of the water was to be exploited.

A party to a treaty may presumably attach to it a matter of purely municipal application, neither affecting nor intended to affect the other party. *But such matter does not become part of the treaty.* The Republic of New Granada, in 1857, attached such purely municipal matter to its ratification of a treaty with the United States. The President of the United States treated the added articles as being no part of the treaty. He ratified the treaty without resubmitting it to the Senate, stating in the Protocol of Exchange of Ratifications:

> . . . considering the said articles as in no way affecting the provisions of the said Treaty, but as

> being acts simply of domestic legislation[7] on the part of the Granadian Confederacy, and as implying no reciprocal obligation on the part of the United States, the said exchange has this day been effected in due form. [Miller, RESERVATIONS TO TREATIES (1919) 27.]

The constitutionality of the reservation as a treaty provision was extensively argued by the parties. The respondent merely suggests that "there is no apparent limit" to what may be done under the treaty power, citing *Missouri* v. *Holland*, 252 U. S. 416 (1920). Intervenor Rochester Gas and Electric Corporation puts the proposition more baldly. It defends this reservation as an "exercise of the treaty-making power to legislate in the domestic field . . .," calling our attention to the fact that the Supreme Court has never held a treaty provision unconstitutional.[8] But it has been pointed out that the Court has never had occasion to consider a treaty provision which "lacked an obvious connection with a matter of international concern." 2 Hyde, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES (2d revised ed. 1945) 1401. The instant reservation is *sui generis*. There is complete agreement by all concerned that it relates to a matter of *purely domestic* concern.

In *Missouri* v. *Holland*, 252 U. S. at 433, Mr. Justice Holmes questioned, but did not decide, whether there was any constitutional limitation on the treaty-making power other than the formal requirements prescribed for the making of treaties.[9] The treaty he sustained related to a "national interest of very nearly the first magnitude"

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[7] Under our Constitution, of course, such matter added to a treaty cannot be effective as legislation. *Supra* note 2.

[8] But cf. *United States* v. *Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *affirmed on other grounds*, 348 U.S. 296 (1955).

[9] The question raised by Mr. Justice Holmes was given an affirmative answer by Mr. Justice Black in *Reid* v. *Covert*, 25 U.S.L. WEEK 4444, 4448-49 (June 11, 1957).

which "can be protected only by national action in concert with that of another power." *Id.* at 435. And it conferred rights and imposed obligations upon both signatories. *Id.* at 431. The treaty power's relative freedom from constitutional restraint, so far as it attaches to "any matter which is properly the subject of negotiation with a foreign country," *Ware* v. *Hylton*, 3 Dall. 199 (1796), is a long-established fact. *Geofroy* v. *Riggs*, 133 U.S. 258 (1890). No court has ever said, however, that the treaty power can be exercised without limit to affect matters which are of purely domestic concern and do not pertain to our relations with other nations.

Our present Secretary of State has said that the treaty power may be exercised with respect to a matter which "reasonably and directly affects other nations in such a way that it is properly a subject for treaties which become contracts between nations as to how they should act"; and not with respect to matters "which do not essentially affect the actions of nations in relation to international affairs, but are purely internal."[10] He had earlier said:

> . . . I do not believe that treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.[11]

Charles Evans Hughes, just before he became Chief Justice and after he had been Secretary of State, addressing himself to the question whether there is any constitutional limitation of the treaty power, said:

> . . . . The Supreme Court has expressed a doubt whether there could be any such . . . . But if there

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[10] *Hearings on S.J.RES. 1 Before a Subcommittee of the Senate Judiciary Committee*, 84th Cong., 1st Sess. 183 (May 2, 1955).

[11] *Hearings on S.J.RES. 1 and S.J.RES. 43 Before a Subcommittee of the Senate Judiciary Committee*, 83d Cong., 1st Sess. 825 (April 6, 1953).

is a limitation to be implied, I should say it might be found in the *nature* of the treaty-making power.

> . . . The power is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be exercised, it may be assumed, with respect to matters that have no relation to international concerns . . . the nation has the power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations, unless there can be found some express prohibition in the Constitution, and I am not aware of any which would in any way detract from the power as I have defined it in connection with our relations with other governments. But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdiction of the States, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power.[12]

In the Dulles view this reservation, if part of the treaty, would be an invalid exercise of the treaty power. In the Hughes view, its constitutionality would be a matter of grave doubt. "The path of constitutional concern in this situation is clear." *United States* v. *Witkovich*, 353 U.S. 194 (1957). We construe the reservation as an expression of the Senate's desires and not a part of the treaty. We do not decide the constitutional question.

It is argued that, since the reservation was a condition to the Senate's consent to the treaty, to deny effect to the condition vitiates the consent and thus invalidates the whole treaty. That argument, we think, was disposed of

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[12] PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (1929) 194, 196.

by the Supreme Court in *New York Indians* v. *United States*, 170 U.S. 1 (1898). That case involved a treaty with certain Indian tribes. The Senate, in its resolution of consent to the treaty, had attached certain amendments and declared that "the treaty shall have no force or effect whatever, . . . nor shall it be understood that the Senate have assented to any of the contracts connected with it until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto . . . ." *Id.* at 21-22. The amendments which the Senate attached to its resolution consenting to the treaty, as the Supreme Court recognized, were not communicated to the Indian tribes. The Court concluded that the amendments were not part of the treaty. It nevertheless treated the Senate's consent as effective to make the treaty valid and operative. *Id.* at 22-24.

The order under review is set aside and the case remanded to the Federal Power Commission.

It is so ordered.

BASTIAN, *Circuit Judge*, dissenting: Petitioner, Power Authority of the State of New York, petitions under § 313 (b) (16 U.S.C. § 8251) of the Federal Power Act to set aside the whole of an order of the respondent, Federal Power Commission. That order dismissed petitioner's application for license under § 4 (e) (16 U.S.C. 797e) of the Federal Power Act for a power project. The application was for a license for a proposed hydro-electric development, including facilities for the diversion from the Niagara River of all of the water available under the 1950 Treaty between the United States and Canada.

Being doubtful of its power to act on the application for license because of a reservation made in the treaty

as a condition to the advice and consent of the United States thereto, the Commission heard oral argument on the application of the 1950 Treaty and the reservation. Thereafter, finding itself without authority to issue a license for the project, the Commission ordered the application dismissed.

Petitioner filed application for rehearing, which was denied by the Commission's order of January 2, 1957; whereupon, the present petition for review was filed.

The facts are largely undisputed and appear in the opinion and order of the Commission dismissing the application for license, as follows:

> "The application proposes a project which, briefly, would consist of an intake structure located about three miles above the falls on the Niagara River, two covered conduits extending about 4.5 miles from the intake around the falls to a proposed pumping-generating plant and reservoir at Lewiston, New York, an open canal by which the water will be carried about one mile from the pumping-generating plant and reservoir to the main power-house, which is also located at Lewiston at the edge of the river and consists of intake structures on the top of the cliff, and a generating station at the bottom of the cliff containing thirteen 150,000 kw. units.
>
> "Up to now power development on the American side at Niagara Falls has been under the authority of a license issued on March 2, 1921, for Project 16 and now held by Niagara Mohawk Power Corporation. Niagara Mohawk's Schoellkopf generating station at the Falls was rendered inoperative by a rock slide on June 7, 1956, but the company has filed an application requesting authority to restore the station in part. The application of Power Authority proposes that if Niagara Mohawk will consent to the surrender of its license for Project 16 it will sell it an amount of power equivalent to that which it has hitherto produced by this project.
>
> "Power Authority's proposal is designed to make use of all the water available under the 1950 treaty,

the purpose of which was to preserve the beauty of Niagara Falls and to bring about the full use of the water resources of the Niagara River. The American share up to the time of the treaty had been only 32,500 cfs, made available under the treaty of 1909 and through subsequent exchanges of notes between the United States and Canada, and has been utilized, up to the time of the rock slide, by Niagara Mohawk's Project 16. The 1950 treaty increased this amount by providing that the United States and Canada should divide equally the water flowing in the Niagara River (with certain adjustments) less 50,000 cfs at certain times and 100,000 cfs at other times, to preserve the beauty of the Falls.

"When the Senate of the United States on August 9, 1950, advised and consented to the ratification of the 1950 treaty, it included the following reservation:

> The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States' shares of the waters of the Niagara River made available by the provisions of the Treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress (1 UST 694, 699).

"Thereafter Canada accepted the reservation and on August 24, 1950, the treaty, including the reservation, was ratified by the President of the United States. It was ratified by Canada on October 5, 1950. Ratifications were exchanged at Ottawa on October 10, 1950. The treaty was proclaimed by the President on October 30, 1950, and entered into force October 10, 1950."

On these facts the Commission very properly concluded that it had no power to determine the constitutionality of an act of Congress, and ruled:

"Where, as here, there is action by the Senate, which was ratified by the President purportedly under the treaty-making power of the Constitution, we likewise

> cannot determine its validity and this is especially true since the action is that of the legislative branch of the government, of which we are an arm and of whose intention we can have no doubt."

There is no doubt that a treaty is not only a contract between sovereign nations but may contain provisions which affect local law within the nation. *Missouri* v. *Holland*, 252 U.S. 416 (1920). The Senate, in connection with its treaty-making powers,[1] is not a mere rubber stamp for the executive. It is true that ordinarily it is the President who originates treaties and negotiates with a foreign nation but he is unable to conclude such treaties without the advice and consent of the Senate. The Senate has the duty of both "advice" and "consent". Both of these terms are important and were so deemed by our founding fathers. Consequently, the Senate has the right to advise reservations and amendments to a proposed treaty and has done so on many occasions. Thus, in the original United States-Canadian Boundary Waters Treaty of 1909 the Senate proposed, and there was adopted, an amendment of understanding. In fact, the Jay Treaty of 1794,[2] the first made by this country after the adoption of the Constitution, was not consented to by the Senate as originally proposed. Instead, the Senate advised and consented to ratification only after an amendment of the proposed terms of the treaty.

The treaty involved here was, as usual, originally sent by the President to the Senate. The Senate advised and consented to ratification upon conditions set out in the reservation. Canada accepted the reservation and, thereafter, on August 24, 1950, the President ratified the treaty as conditioned by the Senate. Canada ratified on October 5, 1950, and the reservation was included in the protocol evidencing the exchange of ratification by the United States and Canada.

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[1] U. S. Const. Art. II, § 2.

[2] 8 Stat. 116 (1794), 1 Malloy Treaties, 590 (1910).

I

Petitioner argues, and the majority holds, that what was called a reservation by the Senate, the President, State Department officials, and the Canadian Government, was not truly a reservation, but merely a declaration of Senatorial policy which has no binding effect. The basis of this argument is that standing alone, without considering other factors, the reservation was a matter of domestic concern having no effect on the rights and duties of the sovereign parties to the treaty, whereas a valid reservation must alter the rights and duties of the parties under the treaty as originally proposed. No need exists for an esoteric discussion of whether the language in question conforms to the scholar's definition of a treaty reservation. If the Senate conditioned its advice and consent to the treaty upon inclusion of the language in question and upon its being given an operative effect—if the Senate did so condition its consent—if the condition was a *sine qua non* to its consent and to ratification—if but for its condition being given effect the Senate would not have consented to the treaty—then regardless of what the language in question is called it must be given effect. Believing this to be the only proper approach to petitioner's contention, I would dispose of that contention by determining the intent of the Senate when it insisted upon inclusion of the language in question in the treaty.

As will be shown in more detail later, the Senate was aware, at the time the treaty was submitted, of pending legislation relative to the development of water-power resources of the Niagara River.[3] It was likewise aware that if the treaty was ratified as written the additional water power available for exploitation by this country would be developed pursuant to the Federal Power Act, *supra*.[4] Whether it should be developed pursuant to that

[3] Senate Executive Report No. 11, 81st Cong., 2d Sess. 6-7 (1950).

[4] *Id.* at 7.

Act or according to the terms of later legislation was a matter of considerable concern to the Senate. If the language of the reservation does not make this clear, and I think it does, then the report of the Senate Foreign Relations Committee does.[5] There is no reasonable construction of the plain language of the reservation or of its legislative history other than this: The Senate desired to consent to the proposed treaty, but not at the expense of foreclosing from the consideration and decision of the Congress at large the question of how the water power would be developed. We should not assume that this reservation, arising from due deliberation, was an idle gesture. Its language is straightforward and to the point. Its meaning is clear. I do not see how we can avoid giving effect to it according to its terms. Of course, if the reservation was beyond the constitutional power of the Senate, it cannot be given effect. If it is beyond the power of the Senate, then not just the reservation falls, but the entire treaty. How can it be otherwise when the Senate has made it abundantly clear that without the reservation it would not have consented to the treaty?[6]

No authority can be found for holding a treaty valid while rendering a Senatorial reservation to it nugatory. *New York Indians* v. *United States*, 170 U.S. 1 (1898), referred to by petitioner, certainly does not do so and has no application to the case before us. In *New York Indians*, the Senate proviso was never incorporated in the text of the treaty; it was not contained in the original or published copy of the treaty; nor was it contained in the Presidential proclamation of the treaty. The Supreme Court indicated that it believed the Senate resolution in question was "mainly directory" and stated " . . . it is difficult to see how it can be regarded as part of the treaty or as limiting at all the terms of the

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[5] *Id.* at 6, 7.

[6] *Id.*

grant."[7] The Court also pointed out that there was no evidence that the Senate amendment of the proposed treaty had ever had the sanction or approval of the President.

Even if the proviso in the Indian treaty were intended as a reservation, that case is clearly distinguishable in important particulars. There the United States sought to invoke the reservation to the detriment of the other parties to the treaty. Also, the United States was doing so despite the fact that the other parties had acted on the basis of the treaty as proclaimed and had no knowledge of the proviso. The Court said that to permit the United States to invoke the proviso "shocks the conscience."[8] This is the language of an estoppel. Upholding a treaty while declaring void a reservation such as this one, and upholding a treaty while estopping the government from asserting an uncommunicated reservation are entirely different situations. Certainly the latter is not authority for the propriety of the former.

Enough has been said already to indicate my disagreement with a holding that the reservation is not a part of the treaty and that the treaty is effective without it.

II

Before turning to petitioner's argument that the reservation in question is beyond the Senate's constitutional power it is important to carefully delineate what is *not* before the court in this case. Doing so should be an aid to a proper understanding of what is. First, the Senate has not by its reservation sought to extort as its price for ratifying the treaty that it be allowed, independently of the Congress at large, to determine the nature and status of domestic legislation or policy. It has not provided that its conditional ratification is to be

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[7] 170 U.S. at 23.

[8] *Ibid.*

regarded as withdrawn if the Federal Power Act *is ever applied* to the water in question. It has merely left the question as to whether that Act or some other should be applied open to determination of both houses of Congress and the President. It has not demanded its way. Its reservation is not self-serving, but purports to extend to the Congress and the President a voice in determining how the increased water supply will be developed. This then is a case where the Senate has not sought to limit the participation of the Congress at large and the President in decisions regarding domestic policy. It is a case in which the Senate has sought to enlarge their participation.

Secondly, this is not a case in which the Senate has exacted as a price for its ratification of a treaty that some new, nonexisting legislation become law. Nor is it a situation where ratification is conditioned on non-application of some general statute not germane to the subject matter of the treaty.[9]

This is simply a case where the Senate has conditioned ratification upon the non-application of the Federal Power Act to the additional water supply made available by the treaty, and provided that decision as to how and by whom that resource is to be developed shall be held in abeyance.[10] These are matters directly germane to the subject matter of the treaty. This is the only case before this court. Those other situations can well await decision in cases where they are presented. The grave constitutional issues they present should not prejudice or cause us to pre-judge this case.

I must disagree with the implication in the majority opinion that this reservation, if a part of the treaty,

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[9] For example, that the Taft-Hartley Act or the Walsh-Healy Act not be applied to employers and employees engaged in development of the water rights obtained pursuant to the treaty.

[10] Of course this would leave the Congress free to provide by legislation, if it chooses, that the Federal Power Act should apply.

would be invalid. The majority say the reservation is not a part of the treaty. There is a definite suggestion that their conclusion is influenced, if not dictated, by a belief that if the reservation were construed as a part of the treaty, then the treaty would be unconstitutional. I can appreciate the majority's reluctance to hand down the first decision invalidating a treaty of the United States. But I cannot, as indicated above, agree that the reservation is not an essential part of the treaty. Nor can I agree that its being a part of the treaty renders the treaty invalid. We are told that the reservation is void because it is regarded as of "purely domestic concern" and therefore not a valid subject matter for a treaty reservation. It is elementary law that treaties may and frequently do affect domestic concerns. Indeed, treaties may repeal previous municipal law passed by the Congress or by state legislatures.[11] Therefore, if this reservation is void, it is not because it affects domestic law to the extent that it requires that the Federal Power Act not apply to the additional water power made available by the treaty.

If void, it must be because the reservation is not only of domestic concern, but is also remote from the valid subject matter of the treaty, and is not inspired by consideration of or pertinent to international relations or policy. While it is true that the President and officials of the Department of State have referred to the question of how the water power made available by the treaty was to be exploited as a matter of domestic concern, certainly that question is not remote from but is germane to the subject matter of the treaty. At the time the treaty was submitted to the Senate for rati-

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[11] Cases recognizing this are: *Cook* v. *United States*, 288 U.S. 103 (1933); *Whitney* v. *Robertson*, 124 U.S. 190 (1888); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870); *Foster* v. *Neilson*, 27 U.S. (2 Peters) 253 (1829); *Ware* v. *Hylton* 3 U.S. (Dall.) 199 (1796).

fication, the question of how and by whom water-power resources of the Niagara River would be exploited was a controversial issue in the Congress. With this controversy in mind, the Senate Foreign Relations Committee, in its report on the treaty, pointed out that extensive public hearings on implementing legislation would probably be necessary. The Committee recognized that it would take considerable time to complete such hearings and to obtain final Congressional action on the pending legislation.[12] Yet the Committee and the Senate as a whole were reluctant to jeopardize the rights which this country would receive under the proposed treaty by delaying its ratification until after Congress had acted upon the pending legislation concerning Niagara River power development. Also, the Senate Committee report reflects a regard for our friendly relations with Canada and stated that prompt ratification of the treaty would "constitute a gesture of good will toward our friendly neighbor, Canada".[13] Another reason given by the Committee for its recommendation of prompt ratification with the suggested reservation was "in order to relieve the acute power shortage in Canada".[14]

Because of the possibility that the Canadians might in the absence of the treaty be compelled to take some unilateral action in harnessing the Niagara power, because undue delay might prejudice our good relations with Canada, and in view of an asserted acute power shortage in Canada requiring speedy ratification, this reservation was intimately and inseparably bound up in international questions. In this context it is *not* purely a domestic concern. If the subject matter of the reservation is domestic in nature, *it was nonetheless inspired by, an outgrowth of, and inextricably connected with, an admittedly valid subject matter of a treaty.* It is not required as a

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[12] See note 3 *supra.*

[13] *Id.* at 7.

[14] *Id.* at 6.

condition to validity that the reservation be in and of itself, treated in artificial isolation or detachment, a domestic matter properly a subject of contract between sovereigns. It is sufficient if it is directly related to a general subject which is properly a matter for contract between sovereigns, and if international policies and considerations are the *raison d'être* of the reservation. As no properly negotiated and ratified treaty of the United States has ever been held invalid there can be no binding judicial authority in support of petitioner's argument for unconstitutionality. Nor is there support in the dicta and comments of the text writers cited by petitioner for the proposition that a reservation or treaty to be valid must have a subject matter which independent of all other considerations is a matter of international concern. Petitioner quotes from *Geofroy* v. *Riggs*, 133 U. S. 258, 267 (1889): "But with these exceptions, [none of which are applicable here] it is not perceived that there is any limit to the questions which can be adjusted [by treaty] *touching any matter which is properly the subject of negotiation with a foreign country.*" [Emphasis supplied] From another case [15] appellant quotes: "The treaty-making power . . . extends to all proper subjects of negotiation with foreign governments." *Asakura* v. *Seattle*, 265 U. S. 332, 341 (1924) is quoted as saying the treaty power extends " . . . to all proper subjects of negotiation between our Government and other nations." Also quoted is language from *Santovincenzo* v. *Egan*, 284 U. S. 30, 40 (1931) where the Court said the treaty power " . . . is broad enough to cover all subjects that properly *pertain* to our foreign relations . . . " (Emphasis supplied) Other statements of like effect are quoted. In the first place each of these statements was written in emphasis of the extent of the treaty power, not in diminution of it. Furthermore, applying the criteria of these cases here does

[15] In re *Ross*, 140 U.S. 453, 463 (1891).

not dictate a conclusion that this reservation is invalid. Certainly in the language of *Geofroy* v. *Riggs, supra,* it "*touches*" a matter properly the subject of negotiation with a foreign government. Likewise it "*properly pertains*" to our foreign relations, to use the language of the *Santovincenzo* case.

Secretary of State Dulles is quoted by the majority as having stated that the treaty power may not be exercised with respect to matters " . . . *which do not essentially affect* the actions of nations in relation to international affairs, but are purely internal." [Emphasis supplied]

> " . . . I do not believe that treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern."

A former Secretary of State and Chief Jusice, Charles Evans Hughes, is also quoted by the majority. That quotation in its essential part is:

> "It [the treaty power] is not a power intended to be exercised, it may be assumed, with respect to matters that have *no relation* to international concerns . . ." [Emphasis supplied]

However true these statements, they should not be regarded as support for finding this reservation invalid. It does not circumvent our constitutional processes; it does affect our international relations; it is related to an international concern.

As I believe this is the proper analysis of whether the reservation is valid, I can only conclude that it was a valid exercise of the Senate's power to consent to a treaty upon an express reservation being attached and given effect.

III

My view that a reservation is valid if it is inspired by, an outgrowth of, and inextricably connected with, an ad-

mittedly valid subject matter of a treaty is not without historical precedent. One precedent which is contrary to petitioner's narrow view of the treaty power is the Webster-Ashburton Treaty of 1842. That treaty settled the northeast boundary of the United States and Canada. The agreement settling the boundary dispute gave to Canada some territory claimed by Maine and Massachusetts. As compensation to those states for the loss of the territory they had claimed, the federal government agreed to pay them a fixed sum of money. The terms of this agreement with the state governments was reflected in the language of the treaty in the following terms,

> "... the Government of the United States agree[s] with the States of Maine and Massachusetts to pay them the further sum of three hundred thousand dollars, in equal moieties, on account of their assent to the line of boundary described in this treaty, and in consideration of the conditions and equivalents received therefor from the Government of her Britannic Majesty."[16]

Lord Ashburton wrote to Daniel Webster that "the introduction of terms of agreement between the general government and the States [of the United States] would have been irregular and inadmissible, if it had not been deemed expedient to bring the whole of these transactions within the purview of the treaty. There may not be wanting analogous cases to justify this proceeding; but it seems proper that I should have confirmed by you that my government incurs no responsibility for these engagements ..."[17]

Surely the agreement between the federal and state governments had in and of itself no bearing on the international rights and duties of the two contracting sovereigns. It in no way affected what the two nations gave

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[16] 8 STAT. 572, (1848); 1 Malloy, Treaties 650, 654 (1910).

[17] 6 Webster, Works 289 (1853).

or received as between themselves. Treated separately, in isolation from a matter which was a valid subject of a treaty, the provision referred to was entirely domestic and concerned our constitutional processes alone. Under petitioner's concept of the treaty powers, the quoted provision of the Webster-Ashburton Treaty would have been invalid and of no effect. Yet the Congress promptly appropriated the money obligated to Maine and Massachusetts without questioning the propriety of the treaty provision.[18]

In the treaty with Spain transferring Puerto Rico to this country, it was provided: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."[19] Legally the political status of inhabitants of newly acquired territory is a question purely of domestic concern. It is a matter for our own constitutional processes. Any foreign interference in such matters would be grossly improper. When this treaty came before the Supreme Court in *Downes* v. *Bidewell*, 182 U. S. 244 (1901) the issue was whether the Constitution imposed the same limitation on Congress in regard to Puerto Rico as it did to the states. The Court concerned itself with the power to incorporate new territories by treaty, and whether the terms of its incorporation could be fixed by treaty. In doing so the provision of the treaty quoted above was considered. Four justices questioned the power to establish the terms incorporating new territory by treaty alone, but specifically endorsed the provision in the treaty that the political status of the inhabitants of the new territory could be left by treaty to await later congressional enactment.[20] The opinion of

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[18] 5 STAT. 623 (1850).

[19] 30 STAT. 1754, 1759 (1899); 2 Malloy, Treaties 1688, 1693 (1910).

[20] 182 U.S. at 312.

Mr. Justice Brown, whose opinion was the judgment of the Court, recognized that a provision in a treaty governing the status of the inhabitants of the newly acquired territory was proper, and that a provision leaving the question of their status to later enactment was also valid.[21]

The recital of these two precedents, which are contrary to petitioner's narrow and conceptionalistic "contract" theory of the treaty power, should not be taken to imply a lack of other historical precedents, for such is not the case.

My colleagues recognize that the Senate could have made the treaty executory by providing in its consent that the rights and obligations of both signatory parties take effect only after passage of an act of Congress. They say, however, that the Senate did not do so. While I agree with this, I cannot agree that the Senate has no power to make the treaty executory as to this country alone.

There are many instances where the Senate has extended to the House of Representatives a voice in determining how treaties will be implemented. The Senate has on many occasions done this by insisting that a treaty not be effective until approved or implemented by an act of Congress. This is particularly so as regards treaties affecting revenues. 1 *Willoughby, The Constitutional Law of the United States,* 558-560 (2d ed. 1929). It is also worthy of note that denial of House participation in domestic legislation effectuated by treaty has been one of the most common causes of controversy over the treaty power.

It is my view that recognition of the Senate's power to condition its consent to a treaty upon its remaining executory on both sides until Congress passes legislation to give the treaty operative effect carries with it

[21] *Id.* at 279-80.

recognition that the Senate may condition its consent upon the treaty not having an operative effect in this country alone until Congress acts. In either event the treaty rights and duties are the same. In one instance both parties are bound to await an act of Congress before exercising their rights under the treaty, whereas in the second instance, which is the case here, only this country is bound to await an act of Congress before availing itself of the rights allotted by the treaty. Why cannot the Senate make the reduction to use of the treaty rights by the United States await an act of Congress? The Senate had no desire to delay Canadian implementation of the treaty; indeed, it recognized that good relations with Canada required that this country not postpone Canadian power development. I see no reason why the Senate must delay our Canadian friends in order to make reduction to use of our water rights under the treaty await congressional enactment.

For compelling practical reasons, based upon international considerations requiring that Canadian execution of the treaty not be delayed, the Senate consented to the treaty, on condition that it remain executory until Congress at large had acted. The Senate has, in the only way it could under the circumstances, sought to insure full legislative determination of a serious domestic issue. I can conceive of no practical objection to this, nor has any been pointed out to me.

While I do not agree with petitioner's narrow contract theory, even if it is correct I nonetheless do not believe it would make this reservation invalid. Petitioner maintains that to be a valid subject matter of a treaty the subject must, standing alone, be a matter of concern to the sovereign parties, and be a proper subject of contract between the parties. I regard this reservation as within that narrow classification. This can be demonstrated with the aid of a realistic assumption of fact.

The text of the treaty indicates the great concern of Canada and our country for not diminishing the scenic beauty of Niagara Falls.[22] This concern was the impetus of this and the earlier treaty concerning Niagara River water power.[23] Assume there was no Federal Power Act or that by that Act's terms it was inapplicable to the Niagara River. Having a legitimate interest in the scenic attraction of Niagara Falls, Canada might well be unwilling to agree to making more water power available if it feared unregulated, irresponsible exploitation of the water resources of the river. Such exploitation might very well be regarded as a menace to the economic and aesthetic interest of Canada in Niagara Falls. Under this assumption, how the water power made available to the United States would be developed would be a matter of prime importance to Canada. That concern might, in the situation assumed, induce Canada to insist upon our share of the water being harnessed subject to regulations protective of the scenic beauty of Niagara Falls. If it be conceded, as I think it must be, that how we develop water-power resources obtained by treaty may be a matter of concern to Canada and not purely a domestic concern, then the reservation in question is within the narrow confines of the treaty power as petitioner views it.

That the Senate and not Canada proposed this reservation does not change the subject matter, but that is the test petitioner proposes. The identity of the party making a proposal cannot change its nature or subject matter. It is still the same proposal. That there is a Federal Power Act and that, but for the reservation, it would apply does not alter the subject matter of the reservation. The existence or nonexistence of domestic legislation is

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[22] Articles II and IV of the treaty.

[23] See Senate Executive Report No. 11, 81st Cong., 2d Sess. 3 and 5 (1950).

clearly not a test of the treaty power. Nor does it change the subject matter of a reservation.

Thus, under a simple and realistic assumption, the reservation can be established as a proper matter for negotiation and contract between sovereigns. Then, even under petitioner's view, it is valid. There is a further basis for attributing to Canada an interest in the reservation. Every party to a proposed treaty which it has negotiated has an interest in that treaty being ratified. If it believes that inclusion of certain terms will win ratification, and non-inclusion would bar ratification by the other party, then those terms are of concern to it. Here Canada did not for these reasons propose the terms of the reservation in question; but it has the same interest in this reservation as if it had done so. This is merely because without the reservation Canada would have had no treaty.

To say that this reasoning is incorrect because Canada did not propose the terms of the reservation is to say that certain terms proposed by a foreign government are the valid subject matter of a treaty, and may affect domestic law, while the same terms included at the insistence of the Senate are invalid because they do not have a valid subject matter. Is not the subject matter the same regardless of who proposed it? Is not the effect on domestic law the same? Is there any basis for achieving a different result except perhaps for theoretical, abstruse or academic reasons? I do not believe the constitutional power to make treaties should be restricted for such reason when every practical, realistic consideration favors the power to do what the Senate and the President have done here.

Conclusion.

It may well be that, no matter how broad the power to make treaties, it is not without limits; and that, like any other power, it can be abused. This case, however, does not pose an abuse of the treaty power. The reser-

vation in question is an instance of self-denial, not usurpation. It does not subvert our constitutional system. It was motivated by a desire that the treaty power should not be used in a manner which would exclude the Congress at large and the President from playing their normal roles in making domestic law.

Unless it can be said that petitioner has a right to have the Senate not make treaties executory in their internal operation, no one is legally injured. Whether treaties should be thus executory seems strictly a political question. Clearly, it is as political a matter as whether the President chose to negotiate a treaty or whether the Senate chose to consent to a treaty negotiated. It would seem that it would be time enough to describe the limits of the treaty power when a case arises where our constitutional scheme of government is subverted, or where there is some usurpation of power, or where what is done under the treaty power is adverse to a legal right of some person or entity.[24]

If petitioner's narrow view of the treaty power is approved by the courts, it would constitute an unfortunate limitation on that power. If the language of the Constitution, the nature of the governmental system it contemplates, or binding judicial authority supported petitioner's theory, its validity would have to be recognized and its effects endured. But there is no support for that theory in our charter of government, nor does it find support in the nature of our political system. There are no judicial authorities favoring that theory.

These reasons being absent, I cannot, on the basis of theory, dicta and text-book definitions, narrowly circumscribe the signally important power to make treaties.

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[24] See *The Treaty Makers and The Law Makers; The Niagara Reservation*, an excellent and cogently reasoned discussion by Louis Henkin, a member of the Columbia Law School faculty. 56 Columbia L.R. 1151.

APPENDIX B

Opinion and Order Dismissing Application for License

[Tr. p. 658]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter

of

Power Authority of the State of New York
Project No. 2216

Opinion No. 298

Appearances

For the People of the State of New York
Jacob K. Javits, Attorney General of the State o
New York.

For the Power Authority of the State of New York
Thomas F. Moore, Jr., Esquire, New York, New Yor
Samuel I. Rosenman, Esquire, New York, New Yor
Philip C. Jessup, Esquire, New York, New York.

For American Public Power Association, et al.
Northcutt Ely, Esquire, Washington, D. C.

For National Rural Electric Cooperative Association an
Rural Electric Cooperatives
Lawrence Potamkin, Esquire, Washington, D. C.

For Rochester Gas and Electric Corporation
Edward F. Huber, Esquire, New York, New York

For the Staff of the Federal Power Commission
John C. Mason, Esquire, Washington, D. C.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

[Tr. p. 659]

BEFORE COMMISSIONERS:

Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

IN THE MATTER

of

POWER AUTHORITY OF THE STATE OF NEW YORK

PROJECT No. 2216

Opinion No. 298

OPINION AND ORDER DISMISSING APPLICATION FOR LICENSE
(Issued November 30, 1956)

There is before us an application by the Power Authority of the State of New York under Section 4 (e) of the Federal Power Act for the issuance of a license for a hydroelectric project (Project No. 2216) to develop and utilize all of the waters of the Niagara River which it is permissible to divert for power purposes in the United States under the terms of the 1950 treaty between the United States and Canada. The principal questions which arise are whether a reservation made in the treaty as a condition to the advice and consent of the United States Senate thereto is valid and therefore effective to prevent our jurisdiction attaching to the water diverted under the treaty and whether, in any case, we are empowered to pass upon the validity of the treaty reservation.

The present application was filed August 20, 1956, with an amendment thereto, September 19, 1956. A number of petitions to intervene were granted by the Commission by orders issued October 25, 1956, and November 1, 1956, as follows: Niagara Mohawk Power Corporation, Attor-

ney General of the State of New York on behalf of the People of New York, National Rural Electric Cooperative Association and 28 rural electric cooperatives or associations distributing electric power in the States of New York, Ohio and Pennsylvania, Rochester Gas and Electric Corporation, County of Niagara, New York, City of Niagara Falls, New York, American Public Power Association, Municipal Electric Utilities Association of New York State, City of Jamestown, New York, and the Town of Lewiston, New York. Oral argument was held on November 14, 1956, at which the application, the 1950 treaty, and the reservation were discussed in detail.

[Tr. p. 660] The application proposes a project which, briefly, would consist of an intake structure located about three miles above the falls on the Niagara River, two covered conduits extending about 4.5 miles from the intake around the falls to a proposed pumping-generating plant and reservoir at Lewiston, New York, an open canal by which the water will be carried about one mile from the pumping-generating plant and reservoir to the main powerhouse, which is also located at Lewiston at the edge of the river and consists of intake structures on the top of the cliff, and a generating station at the bottom of the cliff containing thirteen 150,000 kw units.

Up to now power development on the American side at Niagara Falls has been under the authority of a license issued on March 2, 1921, for Project 16 and now held by Niagara Mohawk Power Corporation. Niagara Mohawk's Schoellkopf generating station at the Falls was rendered inoperative by a rock slide on June 7, 1956, but the company has filed an application requesting authority to restore the station in part. The application of Power Authority proposes that if Niagara Mohawk will consent to the surrender of its license for Project 16 it will sell it an amount of power equivalent to that which it has hitherto produced by this project.

Power Authority's proposal is designed to make use of all the water available under the 1950 treaty; the purpose of which was to preserve the beauty of Niagara Falls and to bring about the full use of the water resources of the Niagara River. The American share up to the time of the treaty had been only 32,500 cfs, made available under the treaty of 1909 and through subsequent exchanges of notes between the United States and Canada, and has been utilized, up to the time of the rock slide, by Niagara Mohawk's Project 16. The 1950 treaty increased this amount by providing that the United States and Canada should divide equally the water flowing in the Niagara River (with certain adjustments) less 50,000 cfs at certain times and 100,000 cfs at other times, to preserve the beauty of the Falls.

When the Senate of the United States on August 9, 1950, advised and consented to the ratification of the 1950 treaty, it included the following reservation:

> The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States' share of the waters of the Niagara River made available by the provisions of the Treaty, and no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress (1 UST 694, 699).

[Tr. p. 661] Thereafter Canada accepted the reservation and on August 24, 1950, the treaty, including the reservation, was ratified by the President of the United States. It was ratified by Canada on October 5, 1950. Ratifications were exchanged at Ottawa on October 10, 1950. The treaty was proclaimed by the President on October 30, 1950, and entered into force October 10, 1950.

It is clear that the purpose of the reservation was to require further action by Congress prior to redevelopment

of the power site at Niagara Falls. The Senate Committee Report (Executive Rept. No. 11, 81st Cong., 2d Sess., p. 7) states:

> Thus without the reservation the redevelopment for power purposes would be governed by the Federal Power Act. The committee intends by the reservation to retain that power in the hands of the Congress.

In the absence of the treaty reservation we would act on the Power Authority's application in accordance with the provisions of the Federal Power Act. But if we are to accept the injunction of the reservation as it stands, we would have no authority to consider the application of the Power Authority on its merits.

In its application and oral argument the Power Authority contends that the reservation is not a part of the treaty because it relates entirely to a matter of domestic concern in that it attempts to amend or repeal in part the Federal Power Act. Therefore, it argues, the reservation cannot supersede the Power Act as a treaty and cannot do so as an act of Congress as it only represents action on the part of the Senate. There is involved a question of whether this type of reservation may be attached to the treaty under Article II, Section 2 of the Constitution, which provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur, * * *," and whether the reservation here became a part of the treaty through its acceptance by Canada and proclamation by the President.

However, we do not believe that we can reach any of these questions. We have several times said and have been supported by the authorities that we will not determine the constitutionality of an act of Congress. *East Ohio Gas Co.*, 1 F. P. C. 586, 592; *Mississippi River Fuel Corp.*,

2 F. P. C. 170, 175; *Central Nebraska Public Power and Irr. Dist.*, 5 F. P. C. 165, 172; *Panitz* v. *District of Columbia*, 122 F. 2d 39, 41-42 (C. A. D. C.); *Todd* v. *S. E. C.*, 137 F. 2d 475, 478 (C. A. 6); *Engineers Public Service Co.* v. *S. E. C.*, 138 F. 2d 936, 952 (C. A. D. C.); *Davies Warehouse Company* v. *Bowles*, 321 U. S. 144, 152-153. [Tr. p. 662] Where, as here, there is action by the Senate,* which was ratified by the President purportedly under the treaty-making power of the Constitution, we likewise cannot determine its validity and this is especially true since the action is that of the legislative branch of the government, of which we are an arm and of whose intention we can have no doubt.

Since the reservation here was intended by the Senate as part of the treaty and was intended to prevent our jurisdiction attaching to the water made available by the treaty, it is entirely authoritative with us as "the supreme Law of the Land" under Article VI of the Constitution. Thus assuming the validity of the reservation, before we may consider the Power Authority's application on its merits, it would seem the Congress must take action in

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*A committee of the House of Representatives apparently assumed the validity of the treaty reservation when in 1953 a bill, H. R. 4351, 83d Cong., 1st Sess., was introduced which would have amended the Federal Power Act and authorized issuance of a license on this project. The report on the bill (House Report No. 713), stated (p. 4):

> "This reservation was adopted pursuant to the recommendation in the report of the Senate Committee on Foreign Relations. The Committee recommended that the Congress instead of the Federal Power Commission under the Federal Power Act decide what method of additional development is in the best public interest."

To the same effect, see House Report No. 2635, 84th Cong., 2d Sess. (1956), p. 7. None of the bills introduced into the Senate or House passed Congress.

accordance with the reservation to permit redevelopment under the Federal Power Act of the waters of the Niagara River made available by the 1950 treaty.

The Commission further *finds:*

We are without authority to issue a license for the redevelopment (Project No. 2216) proposed by the Power Authority of the State of New York.

The Commission *orders:*

The aforesaid application for license for Project No. 2216 is dismissed.

By the Commission.

LEON M. FUQUAY,
Leon M. Fuquay,
Secretary.

[Tr. p. 663]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter

of

Power Authority of the State of New York
Project No. 2216

(Issued November 30, 1956)

Digby and Stueck, Commissioners, *concurring:*

We agree with the majority that the question of whether the reservation initiated by the Senate to the 1950 treaty is valid and binding upon this Commission is not a matter on which we are empowered to make a determination. However, we believe that the Commission's position should be clear in any court proceeding that may arise so as to avoid an unnecessary remand to make a determination that could be made here without entering at all into the merits of the case. Therefore we have considered the treaty reservation as to whether it is properly part of the 1950 treaty, and conclude that it is part of such treaty and "supreme Law of the Land" under the authority of Article VI of the Constitution of the United States.

In the first place it is plain that a treaty is not only a contract between sovereign nations but may contain provisions which affect local law within the nation (see *Missouri* v. *Holland*, 252 U. S. 416) and it is said that the treaty-making power is in terms unlimited (see *Geofroy* v. *Riggs*, 133 U. S. 258, 266-267).

The broad treaty powers are initially at the disposal of the President, who is free to enter upon and carry on negotiations with another country without advising the Senate. In order, however, to give the Senate an effective part in treaty making, the Constitution prevents the conclusion of international treaties except upon the advice and consent of the Senate. If, notwithstanding this apparent

coordinate authority in treaty making, the Senate may do nothing more than give or withhold its consent, a treaty otherwise desirable from the standpoint of the national interest might fail of passage.

It has long been recognized that the Senate may specify reservations, understandings, or other forms of amendment in a proposed treaty in giving its advice and consent to subsequent ratification by the President, *Doe* v. *Braden*, 16 How. 635, 656(57 U. S. 327, 330). In addition, at page 81 of Crandall on "Treaties Their Making and Enforcement" (2d Ed. 1916), it is said [Tr. p. 664]:

> Not usually consulted as to the conduct of negotiations, the Senate has freely exercised its co-ordinate power in treaty making by means of amendments. In case a treaty as negotiated is not acceptable in some of its provisions to the Senate, it is the practice of that body, if it gives its advice and consent to the ratification, to do so with specific amendments, which renders unnecessary the re-submission of the instrument after the consent of the other party to the designated changes has been obtained. . . .

In its Resolution of March 3, 1909, advising and consenting to the proposed United States-Canadian Boundary Waters Treaty of 1909, the Senate set forth an amendment of understanding, relating to rights of owners of lands under water on either side of the international boundary and other matters of domestic concern, which was accepted by the Government of Great Britain prior to its ratification (see Senate Document No. 165, 83d Cong., 2d Sess., p. 111).

When the Senate gave its advice and consent to the ratification of the Mexican Water Treaty of 1945, it attached numerous reservations. Reservation (a) included by the Senate in that treaty (59 Stat. 1219, 1263-1264), provides:

> (a) That no commitment for works to be built by the United States in whole or in part at its expense, or for expenditures by the United States, other than

those specifically provided for in the treaty, shall be made by the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, the United States Section of said Commission, or any other officer or employee of the United States, without prior approval of the Congress of the United States. • • •

This reservation is very similar to the reservation included in the 1950 treaty with Canada.

It does not appear to us material to determine whether the 1950 treaty created a new source of water for the generation of power or relieved a limitation on an existing source. In any case the effect of the treaty was to make available greater hydro resources for use in the United States which otherwise could not be touched without the possibility of our affecting our relations with Canada. The Senate could have chosen to refuse to give its consent to the treaty. It did not do so, but was privileged to do as it did, to give its consent only on condition that the waters made available be developed as specifically authorized by Congress. The [Tr. p. 665] reservation thus represented an exercise by the Senate of its prerogative to advise and consent in the treaty-making process.

.....

Seaborn L. Digby, Commissioner

.....

Frederick Stueck, Commissioner

[Tr. p. 694]

APPENDIX C

[TITLE OF COMMISSION AND PROCEEDINGS OMITTED]

Order Denying Rehearing

(Issued January 2, 1957)

Application for rehearing of the Commission's opinion and order issued November 30, 1956, in this matter, was filed by the Power Authority of the State of New York on December 4, 1956.

The Commission finds:

The assignments of error and grounds for rehearing of the opinion and order of November 30, 1956, set forth no new facts and no new principles of law which either were not fully considered by the Commission when it adopted its opinion and order or, having been now considered, warrant either the vacation or the modification of such opinion and order.

The Commission orders:

The application for rehearing filed herein by Power Authority on November 30, 1956, be and it is hereby denied by the Commission.

By the Commission.

J. H. GUTRIDE
J. H. Gutride,
Acting Secretary.

APPENDIX D

Act of August 21, 1957, 71 Stat. 401
Public Law 85-159
85th Congress, H. R. 8643
August 21, 1957

AN ACT

To authorize the construction of certain works of improvement in the Niagara River for power, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the Federal Power Commission is hereby expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.

(b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:

(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided*, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection.

(3) The licensee shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Power Commission project 16 for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from project 16 was utilized: *Provided*, That the licensee of project 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both licensees and approved by the Federal Power Commission which shall include the following: (a) the licensee of project 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or

from the State of New York, except just compensation for tangible property and rights-of-way actually taken, and (b) without limiting the generality of the foregoing, the licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights, or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise.

(4) The licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in paragraph (1) of this subsection, and to the neighboring States in accordance with paragraph (2) of this subsection.

(5) In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the licensee, consistent with paragraphs (1) and (3) of this subsection.

(6) The licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, may construct a scenic drive and park on the American side of the Niagara River, near the Niagara Falls, pursuant to a plan the general outlines of which shall be approved by the Federal Power Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the licensee's net investment in said project: *Provided*, That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the licensee's net investment shall not exceed $15,000,000.

(7) The licensee shall pay to the United States and include in its net investment in the project herein authorized the United States share of the cost of the construction of the remedial works, including engineering and economic

investigations, undertaken in accordance with article II of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, whenever such remedial works are constructed.

SEC. 2. The license issued under the terms of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized.

Approved August 21, 1957.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 477

AMERICAN PUBLIC POWER ASSOCIATION, THE CITY OF JAMESTOWN, NEW YORK, HANCOCK-WOOD ELECTRIC COOPERATIVE, INC., OF NORTH BALTIMORE, OHIO, AND NORTHWESTERN RURAL ELECTRIC COOPERATIVE ASSOCIATION, INC., OF CAMBRIDGE SPRINGS, PENNSYLVANIA,
Petitioners,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK,
Respondent.

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUIS J. LEFKOWITZ
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POWER AUTHORITY OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Jurisdiction.

Petitioners would invoke the jurisdiction of this Court under 28 U. S. C. § 1254(1). The People of the State of New York, one of the parties to the case in the Court of Appeals for the District of Columbia, suggests to the Court

that its jurisdiction may not be invoked under that section because the petition fails to show (1) that there is presently a case, (2) that petitioners have any such interest in the subject matter as will enable them to petition for a writ of certiorari, and (3) that there is any occasion for the exercise by this Court of its supervisory power over judgments of lower Federal courts by the issuance of a writ of certiorari.

This Court has, of course, jurisdiction to determine its jurisdiction.

The People of the State of New York suggests to the Court that justice requires that the petition for certiorari be denied.

Constitutional Provisions, Treaties, Federal Statutes, Rules Of The Supreme Court, Orders Of The Federal Power Commission And State Statutes And Official Acts Involved.

The Constitution of the United States, Article III, Section 2 (Appendix A to this brief).

The Treaty Between the United States and Canada Concerning the Uses of the Waters of the Niagara River, signed February 27, 1950 and the Reservation the Senate attached thereto (1 U. S. T. 694; T. I. A. S. No. 2130) are set forth in the Joint Appendix below, pages 25-32. The Reservation is quoted *infra*.

28 U. S. C. § 1254(1) (Appendix A to this brief).

Federal Power Act § 313(b) (Appendix A to this brief).

Rule 19 of the Revised Rules of the Supreme Court of the United States (Appendix A to this brief).

Federal Power Act § 4(e) and (f) (Appendix A to this brief).

Act of August 21, 1957, 71 Stat. 401, P. L. 85-159—This Act is set forth in Appendix D to the petition and in pertinent part in Appendix A to this brief.

Order of the Federal Power Commission of November 30, 1956, dismissing respondent's application for a license, is set forth in Appendix B to the petition.

Order of the Federal Power Commission of September 19, 1957, issuing a license to respondent, is set forth in Appendix 4 of respondent's brief and in pertinent part in Appendix A of this brief.

New York Public Authorities Law §§ 1001, 1005, subd. 3, 1008 (Appendix A of this brief).

The formal opinion of the Attorney General of the State of New York that the Power Authority has the right to accept a license issued with the conditions contained in P. L. 85-159, dated July 5, 1957, is set forth in Appendix B of this brief.

Questions Presented.

1. Do the petitioners present a justiciable controversy?

2. Have the petitioners any such interest in the subject matter as will enable them to petition for a writ of certiorari?

3. Is there any occasion for this Court to exercise its supervisory power over judgments of lower Federal courts by the issuance of a writ of certiorari?

4. Does justice require that the petition for certiorari be denied?

5. Is the authority of the Federal Power Commission to issue to respondent the license of September 19, 1957 upon respondent's application of August 20, 1956, as amended September 19, 1956 and September 9, 1957, questioned?

6. Is the validity of the license of September 19, 1957 questioned?

Statement Of The Case.

There came into force on October 10, 1950 a Treaty Between the United States and Canada Concerning Uses of the Waters of the Niagara River (Joint App. p. 36). By that Treaty, which was signed February 27, 1950, both countries agreed that the water resources of the Niagara could be more fully and efficiently used for the generation of hydroelectric power in each country for the benefit of their respective peoples and still preserve and enhance the scenic beauty of the Falls (Joint App. pp. 25-26). To this end, the countries agreed:

To terminate the existing international agreements, Article V of the Boundary Waters Treaty of 1909 (36 Stat. 2448) and the Notes of May and October, 1941 (55 Stat. 1276, 1380), limiting the diversions of water from the river in Canada and in the United States for power purposes;

To complete, under supervision of the International Joint Commission, certain remedial works necessary to enhance the beauty of the Falls and to share the cost thereof;

To make available for purposes of the Treaty—(a) reservation of a sufficient amount of water in the river for scenic purposes, and (b) diversion of water for power

purposes—the total outflow of Lake Erie less the amount of water used for domestic and sanitary purposes and for service of canals;

To prevent diversions for power purposes which would reduce the flow over the Falls to less than a certain number of cubic feet per second at specified times;

To permit diversion for power purposes of the water in excess of that reserved for scenic purposes;

To divide equally the water available for power purposes;

To each designate a representative to determine the amounts of water available for purposes of the Treaty;

To permit the use by one of such part of the other party's share of the water for power purposes as the other did not have the facilities to use;

To absolve each from responsibility for damage in the territory of the other by any act authorized by the Treaty, and

To exchange ratifications, at which time the Treaty would come into force and continue in force for fifty years (Joint App. pp. 25-30).

President Truman, in transmitting the Treaty to the Senate for its concurrence on May 2, 1950, said that "* * * how additional facilities shall be developed to achieve the best use of waters to be diverted for power purposes * * * is not determined by the Treaty itself * * * [and] is entirely a domestic problem" (Joint App. pp. 19-20).

Nevertheless, in its resolution advising and consenting to ratification of the Treaty, the United States Senate included what it termed the following reservation:

> "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States' share of the waters of the Niagara River made available by the provisions of the Treaty, and no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress."

The Senate Committee on Foreign Relations in recommending that the Senate advise and consent to ratification of the Treaty subject to the reservation, said:

> "* * * the subject matter of the reservation concerns the United States Constitutional process alone. * * * without the reservation the redevelopment for power purposes would be governed by the federal power act. The committee intends by the reservation to retain that power in the hands of the Congress" (Joint App. p. 20).

The Department of State, when it called the reservation to the attention of the Canadian Government, took the position that the subject matter was domestic in nature and concerned the United States Constitutional process alone (Sup. Joint App. p. 18).

The Canadian Government accepted the reservation "because its provisions relate only to the internal application of the Treaty within the United States and do not affect Canada's rights or obligations under the Treaty" (Joint App. p. 21).

Since the effective date of the Treaty, all of its provisions have been given effect except that there has been no diversion of additional waters in the United States for power purposes. As authorized by the Treaty, Canada has been diverting not only its share but also the United States' share because facilities are not available in the United States for use of its share (Joint App. p. 21).

Although Congress had not acted in accordance with this reservation, no one challenged the legality of this reservation until August 20, 1956.

On that date Power Authority of the State of New York (respondent), a corporate municipality and a political subdivision of the State charged with the duty of developing the hydroelectric power resources of the State in the Niagara River, filed an application with the Federal Power Commission for a license under Section 4(e) of the Federal Power Act for a power project which would utilize all of the United States' share of the waters of the Niagara River which may be diverted for power purposes (Joint App. pp. 9-14). By this application respondent presented to the Federal Power Commission the question whether the reservation had effectively removed the waters of the Niagara River from its general jurisdiction under the Federal Power Act (Joint App. pp. 14-24).

The People of the State of New York were allowed to intervene in the proceeding before the Federal Power Commission in support of the Power Authority's application (Joint App. p. 35).

The Federal Power Commission dismissed the application on the single finding that it is without authority to issue a license for the redevelopment proposed by the Power Authority (Joint App. p. 39). The Commission based this so-called finding on its conclusion that:

> "Since the reservation here was intended by the Senate as part of the treaty and was intended to prevent our jurisdiction attaching to the water made available by the treaty, it is entirely authoritative with us as the supreme Law of the Land under Article VI of the Constitution * * *" (Joint App. p. 38).

The Power Authority filed in the United States Court of Appeals for the District of Columbia Circuit a petition

under Section 313(b) of the Federal Power Act to set aside the whole of the order of the Federal Power Commission dismissing the Power Authority's application for a license under Section 4(e) of the Federal Power Act for a power project (Joint App. pp. 1-7).

The People of the State of New York were, by order of the Court of Appeals dated February 15, 1957, permitted to intervene as a party in the case in that court. The interest of the People of the State of New York in the case was based upon the provisions of the New York Public Authorities Law section 1001 wherein that part of the Niagara River within the boundary of the State of New York is declared to be a natural resource of the State for the use and development of commerce and navigation in the interest of the people of the state ~~and~~ wherein it is declared that:

> "In order to provide for the most beneficial use of these natural resources, for the creation and development of hydroelectric power in the interest of the people of this state, and to preserve and enhance the scenic beauty of the Niagara Falls and river, such natural resources, including the beds and waters of the said rivers as instrumentalities of commerce and navigation, and the beds, waters, power and power sites in, upon or adjacent to or within the watersheds of the said rivers, owned or controlled by the people of the state, or which may hereafter be recovered by or come within their ownership, possession and control, shall always remain inalienable to, and ownership, possession and control thereof shall always be vested in, the people of the state."

and the provisions of the New York Public Authorities Law section 1008 whereby the Power Authority has the right to occupy and use any and all property of the State of whatever kind or character on the Niagara River, the right to exercise any and every right and power of the State in connection therewith, whether proprietary or sovereign in

character which the State itself might exercise, provided that it does not permit the impairment or limit the future improvement of the navigability of the river and provided that it does not limit, waive or surrender any right or interest of the State in such river of the use thereof.

Petitioners here also sought and were allowed to intervene in the case in the Court of Appeals. In their petition for intervention in that Court they alleged their interest as follows:

> "The movants are keenly aware of the urgent need for additional power supplies to meet needs of domestic and industrial users, as well as national defense requirements. The shortage of low cost power in the area to be served by the proposed redevelopment of the Niagara River presents a serious problem not only for the City of Jamestown, but for those other municipally-owned electric systems of New York State, Pennsylvania and Ohio whose interests are represented by the American Public Power Association. These movants have consistently favored early legislation to authorize construction of the Niagara project by the Power Authority of the State of New York. At an appropriate time they will urge that the redevelopment of the Niagara should follow the pattern established by the Congress [citing statutes] providing for preferences to local public agencies and rural electric cooperatives in the marketing of the power produced."

The case was argued in the Court of Appeals on April 4, 1956.

By a two to one decision handed down on June 20, 1957, the Court of Appeals held that:

> "The disposition of the United States' share of the water covered by this treaty was, even apart from the reservation, something 'which we in the United States must settle under our own procedures and laws.' The reservation, therefore, made no change in the treaty.

> It was merely an expression of domestic policy which the Senate attached to its consent." (Appendix A to the Petition.)

and set aside the order under review and remanded the case to the Federal Power Commission for further proceedings.

Meanwhile, on April 13, 1957, petitioners had appeared before a Subcommittee of the Committee on Public Works, United States Senate, which was holding hearings on bills to authorize the construction of certain works of improvement in the Niagara River for power and other purposes, and had urged passage of a bill authorizing and directing the Federal Power Commission to issue a license to the Power Authority for the construction and operation of a power project with capacity to utilize all of the United States' share of the water of Niagara River permitted to be used by international agreement and mandating the inclusion in such license of certain conditions in respect to preferences in the sale of power from the project. (Hearings before a Subcommittee of the Committee on Public Works, United States Senate, Eighty-Fifth Congress, First Session on S.512, S. 1037, April 10-13, 1957, and pp. 305-309.) Attention is called to the fact that petitioners in their appearance before the Committee did not suggest that they derived any right to any legislation from the Senate's reservation to the 1950 Treaty.

After the decision of the Court of Appeals, the Act of August 21, 1957, Public Law 85-159, became law and as the portion of the Act quoted in Appendix A of this brief shows petitioners obtained from Congress such preference conditions as Congress in its wisdom determined should be included in the license it directed to be issued (Appendix D to petition). It is to be noted that the language of the Act passed by Congress does not refer to the Senate's reservation to the 1950 Treaty.

On August 28, 1957, the Power Authority amended its license application of August 20, 1956 to conform with the provisions of Public Law 85-159.

The next day the Federal Power Commission announced that it would issue a license to the Power Authority as soon as certain engineering studies could be completed.

Although the Federal Power Commission on September 12, 1957 scheduled a public hearing to be held on October 1, 1957 on certain conditions to be included in the final license to be issued to the Power Authority, petitioners did not ask the Commission to do anything in respect to the license the Commission said it was going to issue.

Petitioners filed their petition for certiorari on September 18, 1957, the last day on which they could timely do so and they meanwhile took no steps to stay any proceedings before the Commission on the remand of the case.

The next day the Commission, having completed the engineering studies and without any objection from petitioners, carried out its previously announced intention and issued to the Power Authority a license upon its application of August 20, 1956, as amended, reserving for consideration at the scheduled public hearing certain issues as to which petitioners have evidenced no concern.

On October 15, 1957 the Power Authority notified the Federal Power Commission that it accepted the license.

The aforementioned hearings are now being carried on and petitioners have not entered an appearance.

ARGUMENT.

The Petition Does Not Show The Existence Of A Case.

The judicial power of the United States extends to cases specified in Article III of the Constitution. The petition fails to show that there is presently any case between adverse interests which would permit this Court to exercise the appellate jurisdiction vested in it by Congress to consider granting certiorari (28 U. S. C. § 1254(1)).

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence." (*Mills* v. *Green*, 159 U. S. 651, 653.)

The enactment of Public Law 85-159 renders it impossible for this Court, if it should decide the issue as to the validity of the treaty reservation in favor of petitioners, to grant them any effectual relief whatever. If this Court were to decide that the reservation deprived the Federal Power Commission of authority under the Federal Power Act to issue a license for development of electric power from the United States' share of the waters of the Niagara River, the decision would have no effect whatever on the rights of the petitioners. Every controversy as to the rights of the parties to this case in the Court below was

finally resolved by Public Law 85-159 and there is no longer a case. For that reason alone the petition for certiorari should be denied.

Petitioners Do Not Have Such An Interest In the Subject Matter As Enables Them To Petition For A Writ of Certiorari.

This Court has no power *per se* to say what is the "supreme Law of the Land", but may do so

> "* * * only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. * * *" *Massachusetts* v. *Mellon*, 262 U. S. 447, 488.

To permit consideration by this Court of petitioners' application for certiorari it was incumbent upon them to show in their petition not only that the reservation was effective to deprive the Federal Power Commission of authority under the Federal Power Act to issue a license for development of electric power from the waters of the Niagara River, but also that they have sustained or are immediately in danger of sustaining some direct injury as the result of the determination to the contrary made by the Court of Appeals for the District of Columbia Circuit.

We are not here concerned with petitioners' failure to show that the reservation was legally effective. It suffices, assuming that there is such a showing, to point out that petitioners have totally failed to show that they have sustained or are immediately in danger of sustaining some direct injury as the result of the decision below. The only statement in the petition which purports to assert injury to petitioners is:

> "Unless reversed or vacated, the judgment below is *res judicata* that a Senate reservation was ineffective to accomplish its purpose. It is not right that these petitioners be left in the position of having their claims to the protection of the Senate reservation adjudicated adversely to them, and then be precluded from obtaining review of that judgment solely in consequence of enactment of the very statute designed to occupy the field reserved by the Senate reservation, but which may or may not accomplish that purpose, depending upon future events. The public importance of the question decided adversely below adds emphasis to the problem." (Petition, p. 20)

The enactment of Public Law 85-159 having settled every possible controversy in this case, there is no possibility of the doctrine of *res judicata* being invoked in the future.

Furthermore, the contentions of petitioners are devoid of merit. The Senate reservation did not afford petitioners the claimed protection. If the Senate reservation legally had the effect claimed by petitioners, then it only afforded them the right they have in common with people generally to petition Congress. No one questioned in the Court below petitioners' or anyone's right to petition Congress, nor the power of Congress to enact special legislation with respect to the construction of certain works of improvement in the Niagara River for power. As has been shown, petitioners have exercised their right in this respect and Congress has exercised its power, both irrespective of the

effectiveness of the reservation or the correctness of the adjudication below. Instead of precluding petitioners from getting an adjudication of their claims to the protection of the Senate reservation, Public Law 85-159 precludes petitioners from now asserting any need for such protection. They have what they wanted, at least as much as they can ever get, unless Congress changes the law. We admit the public importance of the question decided below, but we deny that this gives petitioners such an interest in the subject matter as to enable them to petition for certiorari. The petition should therefore also be denied on the ground that petitioners have no justiciable interest.

There Is No Occasion For This Court To Exercise Here Its Supervisory Power Over Judgments Of Lower Federal Courts.

We are aware that

> "* * * The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. * * *" *U. S.* v. *Munsingwear*, 340 U. S. 36, 39.

But as the footnote to this quotation points out, there have been exceptions to this practice. See *Cantos* v. *Styer*, 329 U. S. 686; *Uyeki* v. *Styer*, 329 U. S. 689; *Pan American Airways Corp.* v. *Grace & Co.*, 332 U. S. 827; *Schenley Distilling Corp.* v. *Anderson*, 333 U. S. 878.

The practice of this Court in this respect is founded upon its supervisory power over the judgments of lower Federal courts and it follows this practice so as to prevent a judgment unreviewed because of mootness from being held *res judicata* in other litigation. There is here no need for the Court to follow this practice because the judgment below

can never be held *res judicata* in any other litigation. There can be no other litigation with respect to the issue presented. Public Law 85-159 not only terminated the controversy presented below, but terminated the possibility of any other similar controversy. It therefore can make no difference to petitioners whether this Court grants the writ of certiorari and vacates the judgment or denies the writ. Petitioners can derive neither benefit nor advantage from a vacatur of the judgment.

Petitioners are in the same position they would have been in had Public Law 85-159 been enacted before the decision of the Court of Appeals was rendered. In that event, the Court of Appeals would have reversed the order of the Federal Power Commission and remanded the matter to the Federal Power Commission for further proceedings. And, that is exactly what it has done here.

The situation is similar to that in *Dinsmore* v. *Southern Express Company*, 183 U. S. 115. There the Court said, in part:

> "If the cause had not been submitted in the Circuit Court of Appeals until after the act of 1901 took effect, that court, we apprehend, would have dismissed the suit upon the ground that by the operation of that legislation the whole subject-matter of litigation had disappeared and that the order of the Railroad Commission, even if originally valid, ceased to have any effect. The question whether the express company or the shipper was required by the act of 1898 to furnish the required stamp, as well as the question whether the Railroad Commission had any power to make the order of which complaint is made, would thus have become immaterial, and the dismissal of the suit would have resulted without any reference to the merits of the case as affected by the act of 1898.
>
> "*As the order of the Circuit Court of Appeals directing the dismissal of the suit accomplishes a result that*

> *is appropriate* in view of the act of 1901, *we need not consider the grounds upon which that court proceeded,* or any of the questions determined by it or by the Circuit Court, * * *" [Emphasis supplied.]

Similarly, there is no need for the Court to exercise here its supervisory power over the judgments of lower Federal courts.

Justice Requires That The Petition For Certiorari Be Denied.

On the other hand, it may make a difference to respondent and to the People of the State of New York if this Court grants certiorari and vacates the judgment below. This would leave standing the order of the Federal Power Commission dismissing the respondent's license application and it could be urged that respondent has to apply anew for a license. Because of the above mentioned provisions of Section 4, subdivisions (e) and (f) of the Federal Power Act with respect to giving and publishing notice of application, if respondent is required to file a new application it will entail considerable delay and expense.

Attention is called to the fact that the Committees on Public Works of the Senate and the House of Representatives, in reporting favorably upon the bills which became Public Law 85-159, stressed the fact that there exists an emergency need for construction of works of improvement in the Niagara River for power (85th Congress, First Session; Senate Rep. No. 539; House of Representatives Rep. No. 862).

If this Court vacates the judgment below and subsequently it is argued that therefore respondent's original license application stands dismissed by the original order of the Commission and the amended license application is

a nullity because there was nothing to amend, the argument may be a specious one but the fact that such an argument could be made may well have undesirable consequences to respondent and to the People of the State of New York. Certainly this Court should not take any action which could even be said to cast doubt on the validity of the license issued by the Federal Power Commission, on the specific direction of Congress, to respondent on September 19, 1957 and accepted by respondent on October 15, 1957, particularly where as here the validity of that license and of the Act directing its issuance stand unquestioned.

The People of the State of New York are vitally interested in having the Power Authority proceed as quickly as possible to construct and put in operation the project works authorized under the license of September 19, 1957. If this Court vacates the judgment below, various implications will be drawn from its action, not only in respect to its attitude as to the merits of the controversy below but also as to the effect of its action. The latter implications could be used to impede construction of the urgently needed project works. Justice requires, therefore, that the petition be denied.

The Authority Of The Federal Power Commission To Issue To Respondents A License On September 19, 1957, Upon Respondents' Application Of August 20, 1956, As Amended On September 19, 1956 And September 9, 1957 Is Unquestioned.

If this Court should feel impelled to follow the practice delineated in the *Munsingwear* case, *supra*, and grant certiorari and vacate the judgment below, then we request that it consider the issue whether the Federal Power Commission had the authority to issue to respondents the license

of September 19, 1957, upon respondents' application of August 20, 1956, as amended September 19, 1956, and September 9, 1957. We ask this in order to prevent any implication that all the proceedings heretofore had before the Federal Power Commission are a nullity.

The application of the Power Authority, as amended, and the license issued by the Federal Power Commission and accepted by the Power Authority are in accordance with the provisions of the Federal Power Act and Public Law 85-159. Public Law 85-159 specifically makes the provisions of the Federal Power Act applicable to the construction of works of improvement in the Niagara River for power. Therefore, in issuing the license of September 19, 1957, the Federal Power Commission was authorized to consider respondents' original application under Section 4(e) of the Federal Power Act and, since that application was amended on September 9, 1957 to conform with the provisions of Public Law 85-159, the Federal Power Commission unquestionably had authority to issue the license of September 19, 1957. Therefore, if this Court should decide to grant certiorari and vacate the judgment below, we suggest to the Court that it would not be inappropriate for the Court to explain that its action was not intended to cast any doubt on the authority of the Commission to issue the license of September 19, 1957.

The Validity Of The License Of September 19, 1957 Is Unquestioned.

We appreciate that the issue of the validity of the license of September 19, 1957, is not directly before the Court but we suggest that since it is appropriate to go outside the record to bring to the attention of the Court the question whether the case has become moot, it may also be appro-

priate to go outside the record to bring to the attention of the Court the possible consequences of a vacature by the Court of a judgment below on the ground of mootness.

We, therefore, ask the Court to note, if it should decide to vacate the judgment below, that the validity of the license issued on September 19, 1957, is unquestioned.

CONCLUSION.

The Petition For Certiorari Should Be Denied.

October 14, 1957.

Respectfully submitted,

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of New York

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APPENDIX A.

Constitutional Provisions, Treaties, Federal Statutes, Rules Of The Supreme Court, Orders Of The Federal Power Commission And State Statutes And Official Acts Involved.

Constitution of the United States, Article III, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; * * *
>
> "2. * * * In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

1950 Treaty between the United States and Canada, Niagara River, Water Diversion, and Senate Reservation thereto, are set forth in the Joint Appendix below, pages 25-32. The reservation states:

> "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States share of the waters of the Niagara River made available by the provisions of the treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress."

28 U. S. C. § 1254:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *."

Federal Power Act § 313(b):

"Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States * * *. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification * * *."

Rule 19 of the Revised Rules of the Supreme Court of the United States:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only when there are special and important reasons therefor."

Federal Power Act § 4:

"The Commission is hereby authorized and empowered:

"(e) To issue licenses * * * to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient * * * for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, * * * *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

"(f) * * * the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated."

Act of August 21, 1957, 71 Stat. 401, P. L. 85-159—This Act is set forth in Appendix D to the petition. It provides in part:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That (a) the Federal Power Commission is hereby expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.

"(b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:

"(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for

profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

"(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. * * *."

Order of the Federal Power Commission of November 30, 1956, dismissing respondent's application for a license, is set forth in Appendix B to the petition.

Order of the Federal Power Commission of September 19, 1957, issuing a license to respondent, is set forth in Appendix 4 to respondent's brief but in pertinent part provides:

"(A) This license is issued to Power Authority of the State of New York (hereinafter referred to as the Licensee) under the provisions of Section 4(e) of the Federal Power Act and Public Law 85-159 (71 Stat. 401), for a period of 50 years, effective as of September 1, 1957, for the construction, operation and maintenance of the Niagara Project No. 2216, located on the Niagara River, a navigable water of the United States and an international boundary stream, in the vicinity of Niagara Falls, for the purpose of developing all of the waters of the Niagara River which it is permissible to divert for power purposes in the United States under the terms of the 1950 treaty between the United States and Canada, subject to the terms and conditions of the Federal Power Act, and the aforementioned Public Law 85-159, both of which are incorporated by reference as part of this license, and sub-

ject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act, and subject to the applicable provisions of the aforementioned 1950 treaty between the United States and Canada."

The license also sets forth verbatim the above quoted provision of Public Law 85-159.

New York Public Authorities Law § 1001:

"Those parts of the Niagara and Saint Lawrence rivers within the boundaries of the state of New York are hereby declared to be natural resources of the state for the use and development of commerce and navigation in the interest of the people of this state and the United States. In order to provide for the most beneficial use of these natural resources, for the creation and development of hydroelectric power in the interest of the people of this state, and to preserve and enhance the scenic beauty of the Niagara Falls and river, such natural resources, including the beds and waters of the said rivers as instrumentalities of commerce and navigation, and the beds, waters, power and power sites in, upon or adjacent to or within the watersheds of the said rivers, owned or controlled by the people of the state, or which may hereafter be recovered by or come within their ownership, possession and control, shall always remain inalienable to, and ownership, possession and control thereof shall always be vested in, the people of the state. As amended L. 1951, c. 146, § 1, eff. March 20, 1951."

New York Public Authorities Law § 1005, subd. 3:

"* * * provided, however, that nothing herein contained shall be construed as limiting the power of the authority [respondent] to accept a license issued by the federal power commission pursuant to the provisions of the federal power act, as amended, and the terms and conditions therein imposed pursuant to law * * *."

New York Public Authorities Law § 1008:

"The state of New York hereby consents to the occupation and use by the authority of any and all property of the state of whatever kind or character on the Niagara river or within the international rapids section of the Saint Lawrence river, and hereby vests the authority with and delegates to it the right to exercise any and every right and power of the state in connection therewith, whether proprietary or sovereign in character, which the state itself might exercise, provided that such consent and delegation of power shall not permit the impairment or limit or prevent the future improvement of the navigability of the Niagara river or the international rapids section of the Saint Lawrence river, consistent with the maintenance of such projects, but on the contrary the projects shall be such as will improve and benefit commerce and navigation therein and provided further that the authority shall have no power to limit, waive or surrender any right or interest of the state of New York in such rivers or the use thereof. As amended L. 1951, c. 146, § 14, eff. March 20, 1951."

APPENDIX B.

(SEAL)

STATE OF NEW YORK
DEPARTMENT OF LAW
Albany

Louis J Lefkowitz
Attorney-General

July 5, 1957

Hon. Robert Moses
Chairman, Power Authority of the
State of New York
The Coliseum Tower
10 Columbus Circle
New York 19, New York

Dear Chairman Moses:

You have inquired whether the Power Authority of the State of New York could, under the provisions of Sections 1001, *et seq.*, of the New York Public Authorities Law, accept a license granted by the Federal Power Commission for the construction and operation of a power project with capacity to use all of the United States' share of the waters of the Niagara River, if issued pursuant to provisions and conditions such as contained in S. 2406.

I am of the opinion that should S. 2406 become law and should the Federal Power Commission issue, pursuant to provisions and conditions contained therein, a license to the Authority, the Authority could, under the provisions of Sections 1001, *et seq.*, of the New York Public Authorities Law, accept such a license.

S. 2406 authorizes and directs the Federal Power Commission to issue a license to the Authority for the construc-

tion and operation of such a power project and to include, in addition to those required by the Federal Power Act, the following numbered licensing conditions:

1. The condition that the Authority, in disposing of 50 per centum of the project power, "shall give preference and priority to public bodies and non-profit cooperatives within economic transmission distance" and, if such project preference power is sold to utility companies organized for profit, to make provision for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

This condition is not inconsistent with the preference policy stated in the New York Law, to wit: that in the development of hydroelectric power from the waters of the Niagara River the power "shall be considered primarily as for the benefit of the people of the state as a whole and particularly the domestic and rural consumers to whom the power can economically be made available" and that in furtherance of this policy and to insure use of the power "of the greatest value to the general public" the Authority shall make provision "so that municipalities and other political subdivisions * * * may secure a reasonable share of the power generated".

The Authority has applied this preference policy in the allocations it has made of the power to be generated by its St. Lawrence power project and these allocations have been approved by the Governor acting upon an opinion of the Attorney General that the allocations properly carried out the preference policy stated in the New York law. The allocations made by the Authority of the power to be generated by its St. Lawrence project were 360,000 kw to industrial consumers and 370,000 kw to rural and domestic consumers, including those served by municipalities, rura

electric cooperatives, private utilities and other states. With respect to the latter allocation, the Authority, with the approval of the Governor, entered into contracts for the sale of 100,000 kw to the State of Vermont for resale mainly to rural and domestic consumers; 10,000 kw to the United States Airforce Base at Plattsburgh for defense purposes; 30,000 kw to the City of Plattsburgh for resale to domestic and rural consumers through its municipal sysem; 115,000 kw to Niagara-Mohawk Power Corporation for resale to domestic and rural consumers, to whom there would be passed on the financial savings derived from the purchase of the power by Niagara-Mohawk.

The Authority has also made a tentative allocation of power to be generated by the proposed Niagara project, which allocation also carries out the preference policy stated in the New York law. That tentative allocation is as follows:

Niagara Mohawk (Replacement of Losses at Schoellkopf Plant)	445,000 kw
Anticipated Demands for New National Emergency Defense Plants	300,000 "
Expansion of Existing Industries on Niagara Frontier	250,000 "
Ohio & Pennsylvania Assuming Official Agencies not now in existence are created by law to make firm reliable contracts	150,000 "
Niagara Mohawk, NYSE&G & Rochester Gas & Elec. for Rural & Domestic Consumers	730,000* "
Municipalities including Jamestown and Rural Elec. Coops. within Economic Transmission Distance in New York State which can use and pay for Power	125,000 "
	2,000,000 kw

* 200,000 kw withdrawable for Municipalities and Rural Electric Cooperatives.

These allocations would carry out, as did the St. Lawrence allocations, the policy stated in the New York law, in that the allocations would benefit the people as a whole and particularly domestic and rural consumers. The allocation of 300,000 kw to defense plants would certainly benefit the people as a whole.

2. The condition that the Authority shall make a reasonable portion of the project power subject to the preference provisions available for use within reasonable economic transmission distance in neighboring States (not more than 20 per cent of the project power subject to such preference); provided, if any neighboring State shall have designated a bargaining agency for the procurement of such power, the Authority shall deal only with such agency.

This condition is also consonant with New York law which provides that in disposing of project power the Authority may make appropriate provision "to allocate a reasonable share of project power to agencies created or designated by other states".

The Authority carried out this policy stated in the New York law in the allocation made with respect to St. Lawrence Project power and, with the approval of the Governor, the Authority has entered into a contract for the sale to the State of Vermont of 100,000 kilowatts of the power generated by that project for resale to rural and domestic consumers.

The tentative allocation of 150,000 kilowatts of the power to be generated by the proposed Niagara Project to Ohio and Pennsylvania assuming official agencies, not now in existence, are created by law to make firm reliable con-

tracts, would also carry out the policy stated in the New York law.

Furthermore, this tentative application accords with the provision contained in S. 2406 for making a reasonable portion of the project power subject to the preference provisions available for use within reasonable economical transmission distance in neighboring states. It is significant that this provision in S. 2406 does not require a minimum allocation of project preference power to neighboring states, but provides that the condition shall not be construed to require an allocation of more than 20 per centum of the project power subject to such preference provisions. However, if 20 per centum should be considered the minimum as well as the maximum, there would have to be only a relatively small increase in the tentative allocation to neighboring states to meet such minimum. S. 2406 leaves, as did the Authority's St. Lawrence Project license, the question of the minimum reasonable portion to be made available for use in neighboring states to the determination of the Federal Power Commission in the event of disagreement between the Authority and the power marketing agencies of such states.

The power vested in the Federal Power Commission by the provision contained in the Authority's St. Lawrence Project license and in S. 2406 to determine and fix the applicable portion of power to be made available in neighboring states does not offend the New York law.

The proviso in S. 2406 that the Authority shall deal with bargaining agencies for the procurement of power designated by neighboring states is, as noted above, in accordance with the New York law.

3. The condition that the Authority shall contract, with the approval of the Governor and in accordance with the

procedure established by New York law, to sell to the licensee of Federal Power Commission Project 16 445,000 kilowatts of remaining project power for resale generally to industries so as to restore to such industries low cost power, provided the licensee of Project 16 consents to the surrender of its license, releases any claim for compensation from the Authority or from the State, except tangible property and rights of way taken, and waives all claims for compensation based upon loss of riparian diversionary or other rights relating to the use of the water.

This condition also accords with the policy stated in the New York law. Subdivision 5 of Section 1005 of the New York Public Authorities Law empowers the trustees of the Authority, with the approval of the Governor, to allocate a sufficient portion of Niagara Project power for use by high load industries at or near the project site and, to accomplish the purposes of the Power Authority Act, i. e., to benefit the People of the State as a whole, particularly the domestic and rural consumers to whom the power can economically be made available, to sell power for use by industry to secure a sufficient high load factor and revenue returns to permit domestic and rural use at the lowest possible rates. Indeed, without the power to allocate a sufficient portion of project power to high load industries, the purposes of the New York law could not be achieved.

The Authority applied the policy of the New York law when it, with the approval of the Governor, entered into contracts for the sale of 174,000 kilowatts to Aluminum Company of America and 200,000 kilowatts to Reynolds Metal Company of St. Lawrence Project Power.

The tentative allocation of power from the proposed Niagara Project of 445,000 kilowatts to Niagara Mohawk

for replacement of losses at Schoellkopf Plant and of 250,000 kilowatts for expansion of existing industries on Niagara Frontier would likewise be in accordance with the provisions of the New York law.

Under New York law the Authority has the power to acquire from the licensee of Project 16 tangible property and rights of way and to pay just compensation therefor and the release and waiver by the licensee of Project 16 of other claims or rights would not contravene the New York law.

4. The condition that the Authority shall, if available at reasonable terms, acquire by purchase or other agreement the ownership or use of or, if unable to do so, construct such transmission lines as may be necessary to make the power available to privately owned companies, to preference customers and to neighboring states.

This condition accords with the New York law (Pub. Auth. Law, § 1005, subd. 7) which authorizes the Authority to proceed with the erection of "such transmission lines as may be necessary to conduct electricity to industrial users located at or near the site; and including also the acquisition, by contract only with the owners thereof, of transmission lines or the use of such transmission lines, available or which may be made available, to conduct electricity to such point or points at which electricity is sold by the Authority to any person, corporation or association, public or private."

The provisions in both S. 2406 and New York Public Authorities Law, § 1005, subdivision 7, would deny to the Authority the power to appropriate or condemn existing transmission lines and would require the Authority to construct transmission lines only if it were unable to acquire

the ownership or use of existing transmission lines by purchase or other agreement upon reasonable terms and conditions.

Because there were no existing transmission lines to carry St. Lawrence Project Power to Plattsburgh, the United States Air Force Base at Plattsburgh and to Vermont, the Authority is now engaged in erecting such a transmission line.

5. The condition that in the event that project power is sold to any purchaser for resale, the Authority shall make contracts which shall include provisions for establishing resale rates.

This condition accords with the mandate of the New York law (Pub. Auth. Law, § 1005, subdivision 6(g), and § 1014).

With the approval of the Governor, the Authority has entered into a contract with the Niagara Mohawk Power Corporation for the sale of St. Lawrence Project power to it for resale to domestic and rural consumers under the terms of which Niagara Mohawk is required to pass on to such consumers such financial savings as it may derive from the purchase of the power.

6. The condition that the Authority in cooperation with the appropriate agency of the State concerned with the development of parks may construct a scenic drive and park on the American side of the Niagara River, the cost of which shall be considered a part of the cost of the power project provided it shall not exceed $15,000,000.

This condition does not contravene the New York law because the Authority is empowered by subdivision 3 of Section 1005 of the New York Public Authorities Law to accept a license issued by the Federal Power Commission

pursuant to the provisions of the Federal Power Act, as amended, and to accept the terms and conditions therein imposed pursuant to law, particularly where, as here, the condition does not conflict with the New York law. Indeed this condition would be a fulfillment of the policy of the New York law "to preserve and enhance the scenic beauty of the Niagara Falls and river".

7. The condition that the Authority shall pay to the United States and include in its net investment in the project the United States' share of the cost of the construction of certain remedial works provided in Article II of the Treaty between the United States and Canada.

For the reason stated as to condition No. 6 and also for the reason that, under subdivision 7 of Section 1005 of the New York Public Authorities Law, the Authority is authorized to undertake such remedial works, this provision does not contravene the New York law.

As shown above, the New York law does not prevent the Authority from accepting a license issued by the Federal Power Commission for the construction and operation of a power project with capacity to use all of the United States' share of the waters of the Niagara River, if such license were issued pursuant to the provisions and conditions as contained in S. 2406.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General

JRDAVISON:jml

Office - Supreme Court, U.S.
FILED
OCT 18 1957
JOHN T. FEY, Clerk

No. 477

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

AMERICAN PUBLIC POWER ASSOCIATION, THE CITY OF JAMESTOWN, NEW YORK, HANCOCK-WOOD ELECTRIC COOPERATIVE, INC., OF NORTH BALTIMORE, OHIO, AND NORTHWESTERN RURAL COOPERATIVE ASSOCIATION, INC., OF CAMBRIDGE SPRINGS, PENNSYLVANIA,
Petitioners,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR POWER AUTHORITY OF THE STATE OF NEW YORK IN OPPOSITION

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STATUTES:

Federal Power Act (41 Stat. 1063 as am., 16 U.S.C. § 791-825r)
Section 4(e) 4, 5, 8, 17
Section 313 ..... 7, 11

Public Law 85-159, approved August 21, 1957 ..... 8, 18

MISCELLANEOUS:

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Senate Report 539, 85th Cong., 1st sess. 19
Restatement on Judgments, § 69(2) 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 477

AMERICAN PUBLIC POWER ASSOCIATION, THE CITY OF JAMESTOWN, NEW YORK, HANCOCK-WOOD ELECTRIC COOPERATIVE, INC., OF NORTH BALTIMORE, OHIO, AND NORTHWESTERN RURAL COOPERATIVE ASSOCIATION, INC., OF CAMBRIDGE SPRINGS, PENNSYLVANIA, *Petitioners*,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR POWER AUTHORITY OF THE STATE OF NEW YORK IN OPPOSITION

OPINIONS BELOW

The Opinion of the Court of Appeals for the District of Columbia Circuit is in Appendix A to the Petition, and also in the record, pages 47-75. It is as yet unreported. The Opinion of the Federal Power Commission is in Appendix B to the Petition, and also in the record, pages 33-42.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. The license for the Niagara power project having been issued by the Federal Power Commission to respondent with preference provisions sought by petitioners, is there any invasion or threat of invasion of any legally protected right of petitioners so that they have a justiciable interest sufficient to prosecute their petition?

a. Does their "claim to the protection of the Senate reservation" afford them a justiciable interest?

b. Does the possibility of the application of the rule of *stare decisis* in some future cause of action involving other parties and some other Senate reservation to some other treaty concerned with other power project developments afford them a justiciable interest?

2. Should the judgment below be vacated if the controversy is not entirely moot, because the judgment has present effect?

3. Assuming the controversy is "probably moot", as asserted by petitioners, should the judgment below be vacated since, even if *res judicata*, the judgment would create no legal consequences adverse to petitioners and is consistent with the 1957 Act?

STATUTES, TREATY, AND FEDERAL POWER COMMISSION ORDERS INVOLVED

Section 4(e) of the Federal Power Act of 1920 is set forth in the Appendix to this Brief, pp. 1a-2a.

The 1950 Treaty between the United States and Canada, with respect to Niagara River water diversion, and the Senate reservation thereto, are set forth in the record, pages 25-33.

The Opinion and Order of the Federal Power Commission of November 30, 1956, dismissing respondent's application for a license to develop the Niagara power project, are set forth in Appendix B to the Petition, and also in the record, pages 33-42.

The Act of Congress of August 21, 1957 (Public Law 85-159) directing issuance of the license, is set forth in Appendix D to the Petition.

The Order of the Federal Power Commission of September 19, 1957, issuing the license, is set forth in the Appendix to this Brief, pp. 8a-19a.

STATEMENT

The petition for certiorari seeks relief in the alternative: First, a review of the decision below on the merits; or, second, if the "judgment" below is moot, a vacatur of that judgment. (Pet. p. 23). Power Authority of the State of New York, while strongly of the view that the decision below is correct, recognizes that it deals with an important question of Constitutional law which has not been settled by this Court. The Power Authority, however, opposes the granting of the petition for certiorari for the reasons that (1) the petitioners do not have sufficient justiciable interest to raise that question before this Court (2) the controversy is not entirely moot in the sense that the judgment below has present effect, and (3) even if "probably moot", as asserted by petitioners, the judgment, which is entirely consistent with the 1957 Act, would create no legal consequences adverse to Petitioners.

Petitioners were interveners before the Court of Appeals.* Neither the Federal Power Commission,

* There is a question whether petitioners, Hancock-Wood Electric Cooperative, Inc., and Northwestern Rural Electric

the respondent below, nor other interveners, Oneida Madison Electric Cooperative, Inc., and 25 other rural electric distribution cooperatives, nor Rochester Gas and Electric Corporation, have petitioned for certiorari. Intervener, The People of the State of New York, opposes the granting of the petition.

The Federal Power Act (41 Stat. 1063, as am.; 16 U.S.C. §§791-825r) in §4(e) thereof, authorizes the Federal Power Commission (referred to herein as the "Commission") to issue licenses for development, transmission, and utilization of power from streams over which Congress has jurisdiction under the Commerce Clause. The Niagara River, an international boundary river, is such a stream.

The 1950 Treaty with Canada made available to the United States additional water from the Niagara River to be diverted for power purposes. The Senate advised and consented to ratification of the treaty with a reservation:

> "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit of

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Cooperative Association, Inc., are properly parties in the proceeding before this Court. They are two of the twenty-eight members of the National Rural Electric Cooperative Association. The motion of that Association to intervene was denied by the Court of Appeals but the motion of the twenty-eight members to intervene was granted with the limitation "that the twenty-eight member cooperatives be and they are hereby, allowed to intervene *collectively as a single party in the above case*" (emphasis supplied).

Of the twenty-eight members only two of them, Hancock-Wood and Northwestern, are petitioners here. They have not sought to intervene before this Court but presumably rely on their limited intervention below where they were not parties but were only "collectively" with the other twenty-six members "a single party".

> the United States' share of the waters of the Niagara River made available by the provisions of the Treaty, and no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress."

Canada "accepted" the reservation without procuring the approval of Parliament—

> "because its provisions relate only to the internal application of the Treaty within the United States and do not affect Canada's rights or obligations under the Treaty:" (R 20-21).

Legislation, as contemplated by the reservation, was not passed until August 21 of this year, seven years later and after the decision of the Court of Appeals was handed down. That legislation is outlined below.

Meantime, on August 20, 1956, respondent, Power Authority of the State of New York, filed with the Commission an application under §4(e) of the Federal Power Act for a license for a power project for development of the Niagara River (R 9-24). Power Authority of the State of New York (referred to herein as the "Power Authority") is a corporate municipal instrumentality and political subdivision of the State of New York and has the duty, under the laws of that State, of developing hydroelectric power resources of the State of New York in the Niagara and St. Lawrence rivers. The Power Authority finances projects for developing these resources solely through moneys obtained from the sale of its revenue bonds to investors without State or Federal credit.

In support of its application the Power Authority urged before the Commission that the reservation re-

lated solely to a matter of domestic concern and did not affect the rights and obligations of the parties to the Treaty; that it was a mere colorable use of the treaty-making power and not a true reservation within the legal meaning of that term; and, therefore, it was not a part of the Treaty or of the "Supreme Law of the Land". Consequently, the reservation was not a bar to the exercise by the Commission of its jurisdiction under the Federal Power Act.

The Commission, on November 30, 1956, issued its opinion, findings, and order. (R 33-34; Pet. p. 30a). The Commission stated—

> "In the absence of the treaty reservation we would act on the Power Authority's application in accordance with the provisions of the Federal Power Act. But if we are to accept the injunction of the reservation as it stands, we would have no authority to consider the application of the Power Authority on its merits . . .
>
> "Since the reservation here was intended by the Senate as part of the treaty and was intended to prevent our jurisdiction attaching to the water made available by the treaty, it is entirely authoritative with us as "the supreme Law of the Land" under Article VI of the Constitution. Thus assuming the validity of the reservation, before we may consider the Power Authority's application on its merits, it would seem the Congress must take action in accordance with the reservation to permit redevelopment under the Federal Power Act of the waters of the Niagara River made available by the 1950 Treaty."

The Commission further found that it was "without authority to issue a license" for the project and dismissed the application (R 38-39; Pet. p. 36a). Re-

hearing was denied January 2, 1957 (R 46; Pet. p. 40a).

The Power Authority, on January 4, 1957, petitioned the United States Court of Appeals for the District of Columbia Circuit, under §313(b) of the Federal Power Act, to set aside the Commission's order of dismissal (R 1). The present petitioners intervened before that Court. Petitioners stated to the Court that while they "desire immediate development of the additional power potentially made available to the United States by the 1950 Treaty with Canada", they also desire "that the development be authorized by legislation which will follow the historic congressional pattern of providing preferences to local public agencies in the marketing of the power produced by a public development". (Petitioner's Brief below, p. 3; App. this Brief, p. 20a). Consequently, petitioners challenged the Commission's jurisdiction, in the face of the Senate reservation, to grant the application of the Power Authority for a license.

The Court of Appeals entered judgment June 20, 1957, setting aside the order of dismissal and remanding to the Commission for further proceedings not inconsistent with the court's opinion (R 76). The Court of Appeals held that the Senate reservation was not a true reservation that becomes part of a treaty. It made no change in the rights or obligations of either party under the treaty, but was merely an expression of domestic policy which the Senate attached to its consent. (R pp. 52-53; Pet. pp. 6a-7a). The Senate reservation, therefore, was not "Law of the Land" under the Supremacy Clause in Article VI of the Constitution and did not alter the Federal

Power Act or the jurisdiction of the Commission thereunder.

By Public Law 85-159, approved August 21, 1957, the Commission was "expressly authorized and directed to issue a license to the Power Authority for the construction and operation of a power project with capacity to utilize all of the United States' share of the water of the Niagara River permitted to be used by international agreement". (Pet. p. 41a). This 1957 Act further directed the Commission to include, among the licensing conditions, certain preferences and other conditions "in addition to those deemed necessary and required under the terms of the Federal Power Act". Preference conditions of the type sought by petitioners were required by the 1957 Act to apply to half the power from the project. These preference conditions are presently satisfactory to petitioners. (Pet., pp. 10-11).

The Power Authority, on August 28, 1957, amended its original application so as to bring the application under the new Act as well as under §4(e) of the 1920 Act. The Power Authority stated (App. this Brief, p. 5a) in its amendment (referring to the preference conditions in §1(b) (1) and (2) of the 1957 Act) that—

> "The Attorney General of the State of New York has officially informed Applicant that these conditions are consistent with the provisions of the Power Authority Act [of New York State], and Applicant will accept them."

On August 29, 1957, the Commission announced that it would issue a license to the Power Authority as soon

as the necessary engineering and other studies could be completed, but that it would hold hearings later on the water conveyance facilities and the size of the reservoir.

On September 12, 1957, the Commission scheduled a public hearing to be held commencing October 1, 1957, respecting the issues raised by certain interveners before the Commission, the City of Niagara Falls, the Town of Lewiston, and the County of Niagara, New York, concerning their opposition to the type of water conduits and the size of the reservoir proposed by applicant, and respecting the issues raised by intervener, the International Paper Company, concerning its claim to water rights involved in *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239. (App. this Brief, p. 9a). That hearing is now in progress. Petitioners are taking no part in it.

Petitioners filed their petition for certiorari September 18, 1957, the last day they could legally do so.

On September 19, 1957, the Commission granted the amended application and issued the license to the Power Authority under the terms of the 1920 and 1957 Acts. (App. this Brief, p. 8a). As stated above, the license contains the preference provisions provided by Congress. (App. this Brief, Arts. 20-21, pp. 14a-15a). The license provides that certain further conditions will be later prescribed by the Commission, including details of the water conduits and size of the reservoir. These matters left open by the license are being dealt with in the hearing scheduled by the Commission for October 1st and now in progress.

On October 15, 1957, the Power Authority notified the Commission of its acceptance of the license.

ARGUMENT

I. Petitioners Have No Justiciable Interest

The question of standing to sue or justiciable interest depends on particular facts. This Court has characterized the question as a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations". *United States* v. *Federal Power Commission*, 345 U.S. 153, 156 (1953).

Before the petition for certiorari may be granted and the question of vacating the judgment below reached, petitioners must show that they have an interest sufficient to give them standing to petition this Court. Petitioners must show that the controversy is one that, as to them, involves actual or threatened invasion of—

> "some legal right, one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege". *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 137 (1939).
>
> "The touchstone to justiciability is injury to some legally protected right . . ." *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 141 (1951).

Petitioners and others were accorded a right of intervention in this proceeding before the Commission, "provided, further, that the admission of the petitioners shall not be construed as recognition by the Commission that they, or any of them, might be aggrieved because of any order or orders by the Commission in this proceeding". Petitioners were not

"aggrieved" (see Act §313, 49 Stat. 860, 16 U.S.C. §8251(b)) by the Commission's order of dismissal.

In the Court of Appeals petitioners sought anew and were accorded the right to intervene before that Court in the review proceeding instituted by the Power Authority. This does not mean, however, that by the mere fact of intervention below, petitioners acquired sufficient interest to institute a review proceeding in this Court.

The record before this Court contains no statement of petitioners' interest, nor was any finding made below as to petitioners' interest. The petition for certiorari does not state petitioners' interest. In their brief before the Court below, petitioners did, however, make a statement of interest. (App. this Brief, p. 20a). They said that they "desire immediate development of the additional power potentially made available by the 1950 Treaty with Canada" but—

> "They desire, however, that the development be authorized by legislation which will follow the historic congressional pattern of providing preferences to local public agencies in the marketing of power produced by a public development".

That legislation was enacted. Petitioners now state that they do not object to the issuance of a license by the Commission to the Power Authority if it contains preference provisions (such as those in the 1957 Act) for the sale of project power to electric public utilities within the service area.* (Pet. pp. 10-11). Such a license was issued the day following the filing of the petition for certiorari.

---

* Petitioners add "and if the Power Authority can lawfully accept them," i.e., accept the preference conditions. Pet. p. 11. Petitioners admit that the question of the Power Author-

The controversy below concerned the validity of the order of the Commission dismissing, for lack of authority to issue, the application of the Power Authority for a license under §4(e) of the Federal Power Act of 1920. Whatever interest, if any, petitioners, as interveners below, may have had with respect to the controversy, they no longer have any interest in it. They have not stated on this record any present interest sufficient to prosecute their petition for certiorari in this Court.

Moreover, petitioners not only have no present justiciable interest, but also, as pointed out below, they have never had a justiciable interest in the particular controversy decided below.

A. Petitioners Have No Legal Right in This Controversy to "Protection of the Senate Reservation."

While the petition for certiorari does not state petitioners' present interest, it does assert a claim to "protection of the Senate reservation". Petitioners say (Pet. p. 20)—

> "It is not right that these petitioners be left in the position of having their claims to the protection

---

ity's legal capacity to accept the preference conditions is not before this Court. Pet. p. 11. Furthermore, the Attorney General of the State of New York, in his opinion of July 5, 1957, states that the Power Authority may legally accept preference conditions of the character that are found in the Act of August 21, 1957, and the Power Authority in its amended application stated that it would accept them. (App. this Brief, p. 5a). On October 15, 1957, the Power Authority in fact accepted the license including such preference conditions. The opinion of July 5 appears in the Appendix to the Brief of the People of The State of New York.

of the Senate reservation adjudicated adversely to them, and then be precluded from obtaining review of that judgment solely in consequence of enactment of the very statute designed to occupy the field reserved by the Senate reservation, but which may or may not accomplish that purpose, depending upon future events."

Valid or invalid, the Senate reservation, in contemplating Congressional legislation, vested in no one any legally enforceable right to such legislation. The courts are not a forum to seek or compel the enactment of legislation by Congress. Petitioners had no "right" to the enactment of legislation with or without preference provisions. Petitioners' right in this area was limited to their right to petition Congress under the First Amendment.

Neither did the Senate reservation give petitioners a legal right before the courts to bar the Commission from issuing a license pending further legislation. The provision in the reservation that "no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress," (even if the reservation were valid as law) imposed a duty on the Commission only, not on potential consumers of any power produced from the project. The reservation sets forth relations between two branches of Government. The Senate did not, by its reservation, commission potential consumers to defend whatever prerogatives the Senate may have had in the situation. When prerogatives of the Congress or either House are threatened, the Congress or either House may, if it chooses, seek relief from the courts in appropriate situations, but the Sen-

ate reservation created in petitioners no legally protected rights. Petitioners are not *parens Senatus*. Cf., *Frothingham* v. *Mellon*, 262 U.S. 447, 486 (1923); *Fairchild* v. *Hughes*, 258 U.S. 126 (1922).

Moreover, even assuming *arguendo* that the Senate reservation gave petitioners a legally protected right to bar the Commission from issuing a license pending further legislation, that right disappeared with the Act of August 21, 1957. Whatever legally protected rights petitioners may have, there is no present actual or threatened invasion of them.*

B. Petitioners Have No Legal Right in This Controversy With Respect to Reservations in Some Other Treaty

Petitioners have no present interest whatever in the Senate reservation to the 1950 Treaty with Canada, yet they invoke this Court's aid. Petitioners' reasons are not stated in their petition. Petitioners have, however, in a letter to counsel for the Power Authority, stated that—

> ". . . our principal reason for wishing to see the decision of the Court of Appeals vacated is the doubt cast by the language of the opinion on the *validity of treaty reservations not necessarily restricted to the 1950 Treaty with Canada.* We have deemed it necessary, therefore, to petition for a

* We fail to understand petitioners' assertion (Pet., p. 20) that the 1957 Act "may or may not . . . depending upon future events" accomplish the purpose of occupying "the field reserved by the Senate reservation." The validity of the 1957 Act is not questioned. The power of Congress to amend or repeal that Act is not questioned. Vacating the judgment below will not protect petitioners in any rights they may have in the 1957 Act.

writ of certiorari for the express purpose of requesting the Supreme Court to declare the judgment of the Court of Appeals moot, and to *vacate the opinion*. (emphasis supplied) (App. this Brief, p. 7a).

It is suggested that petitioners' present interest is in the Senate reservations to the Mexican Waters Treaty. See, Pet. p. 15, fn. Petitioners' concern appears to be with some possible future litigation involving other parties, a different treaty, different reservations, and different power projects. They hope that vacating the judgment below in this case will in some way place the imprimatur of this Court on the validity of Senate reservations to some other treaty, or at least devalue the opinion of the Court of Appeals as to the lack of validity as law of the Senate reservation to the 1950 Treaty with Canada. Even assuming that the rule of *stare decisis* would have some application in this speculative future litigation, that rule does not create a justiciable interest in petitioners in this case.

The petition for certiorari should be denied at the threshold on the ground that Petitioners have no justiciable interest.

II. The Judgment Below Should Not Be Vacated

When a controversy has become moot on its way to this Court, the practice of this Court has been to reverse or vacate with a direction to dismiss. This practice is limited, however, by the objective of preventing the judgment "from spawning any legal consequences." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

The judgment below should not be vacated even if petitioners were found to have sufficient justiciable interest to petition for certiorari. The judgment should not be vacated because it is not entirely moot even if it becomes *res judicata*, no legal consequences adverse to petitioners can be spawned. Further the judgment should not be vacated since it is consistent with the 1957 Act.

A. The Controversy Is Not Entirely Moot Because the Judgment, Which Is Completely Consistent With the 1957 Act, Is Presently Effective

Even petitioners recognize that the controversy is not entirely moot. They state only that:

> "The question whether the treaty reservation could or could not validly preclude proceedings under the Federal Power Act is thus rendered probably moot. *We say 'probably' because the 1957 Act is not plainly exclusive.*" (Pet. p. 20, emphasis supplied).

Petitioners elsewhere in their petition also state that:

> "the *judgment* . . . has *probably, although not certainly,* been rendered moot by the 1957 legislation, enacted after its entry, . . ." (Pet. p. 11, emphasis supplied).

The application of the Power Authority for a license was filed under § 4(e) of the Federal Power Act of 1920. The 1957 Act provides that a license shall be issued by the Commission to the Power Authority and shall include the licensing conditions in the 1957 Act "in addition to those deemed necessary and required under the terms of the Federal Power Act." (Pet. p. 41a). Thus the license is required to be issued under authority of both Acts. In consequence, the original

application was amended to bring it under the 1957 Act, as well as the 1920 Act. This procedure was not only in accordance with the Act of Congress, but also it avoided the delay that would have followed the filing of a new application and the investigations, reports, and administrative proceedings incident thereto. Pursuant to the original application as amended, the license was issued by the Commission under authority of both Acts. (App. this Brief, p. 13a).

The Commission's order dismissed the original application after a finding of lack of authority to issue it under §4(e) of the 1920 Act. The Court of Appeals' judgment is that the order of the Federal Power Commission on review is "set aside and the case remanded to the said Federal Power Commission for further proceedings not inconsistent with the opinion of this Court". Such "further proceedings" have now been had. Pursuant to the original application as amended, the license has now been issued by the Commission under §4(e) of the 1920 Act and Congress directed that it be issued under that Act provided the 1957 Act conditions were also attached to the license. To vacate a judgment setting aside the Commission's order dismissing the application for the license under §4(e), could be construed to leave the Commission's order of dismissal of the application in force with the sanction of this Court. There would thus be sanctioned a dismissal order that is contrary to the Commission's present order granting the application and issuing the license.

It accordingly appears that the judgment below setting aside the Federal Power Commission's order of dismissal and remanding the matter to the Commission is not without present effect and is not therefore

entirely moot. The concept of absolute finality is the only basis for the granting of motions to dismiss where questions have become moot.

In *Miller* v. *Milford*, 276 N.W. (Iowa, 1937) 826, 114 ALR 1423, 1437 it was said that

> "A question is not moot if there remains anything on which a decision of the Court can operate."

Petitioners are correct in stating that "the 1957 Act is not plainly exclusive . . .". The 1957 Act is only supplementary to the 1920 Act and the application must be applied for and issued under the 1920 Act, as well as the 1957 Act. This is required by the 1957 Act, itself, and is the procedure followed by the Power Authority in amending its original application.

There is also the very serious element of time involved and delay that could result from setting aside the judgment below, which further demonstrates it is not entirely moot. Unless the Court gives definite indication to the contrary, it could be argued by persons interested in obstructing the project that reinstatement of the Commission's order of dismissal might require the filing of a new application. A new application would result in new departmental investigations and reports and new proceedings before the Commission. Any such delay would be contrary to the public interest and is something that petitioners disclaim wanting to occur. The House Committee on Public Works stated in its report on the 1957 Act—

> "Emergency Need for Prompt Legislation
>
> "On June 7, 1956, a rockslide completely destroyed about two-thirds of the power generating capacity on the United States side of the

Niagara River. When this disaster occurred to the Schoellkopf powerplant of Niagara Mohawk Power Corp., the plant had a capacity of some 365,000 kilowatts of firm hydroelectric power. The operations of huge concentrations of electrometallurgical and electrochemical industries at Niagara Falls depend in substantial part upon this capacity. These operations constitute the principal sources of employment on the Niagara frontier and comprise the heart of the economy of the area. They are vital to the national defense. Substitute power, largely imported from Canada on a temporary basis, is much more costly.

"Further, Canada proceeded immediately to construct and complete the project redeveloping its share of the water, and, under the terms of the treaty, Canada has been and will continue to be, free to utilize our share of the water until we are ready to do so. The economic waste attributable to continued nondevelopment of the United States share of the water already aggregates hundreds of millions of dollars." (H. Rept. 862, 85th Cong., 1st sess., p. 2).

A similar statement was made by the Senate Committee on Public Works, S. Rept. 539, 85th Cong., 1st sess., p. 3. It is submitted that the public emergency involved is one of which this Court can and should take judicial notice.

B. The Judgment of the Court of Appeals Will Spawn No Legal Consequences Adverse to Petitioners

Even if the judgment of the Court of Appeals becomes *res judicata*, petitioners are not affected by it in this case save that it buttresses the license that petitioners favor and that has been issued. Neither can the judgment have any effect on petitioners by way of collateral estoppel.

The 1957 Act directed that the license to the Power Authority provide for utilizing *all* of the "United States share of the water of the Niagara River permitted to be used by international agreement." The license issued provides for development of all additional power available to the United States under the 1950 Treaty. There can be no other license for development of such power by the Power Authority or any other person. No question as to the validity of the Senate reservation to that Treaty and its effect as a bar to the Commission's jurisdiction can again arise.

The judgment of the Court of Appeals on the jurisdictional question arising out of the Senate reservation to the 1950 Treaty with Canada, even though that judgment becomes *res judicata*, will not give rise to collateral estoppel in some other litigation. Any other asserted cause of action involving that question would be wholly frivolous. Petitioners suggest no possible adverse effects from *res judicata*. Moreover, where a final decision on appeal to the highest Court cannot be obtained because the controversy is moot, the judgment is not conclusive in a subsequent action on a different cause of action. Restatement on Judgments, § 69(2); *Allegheny County* v. *Maryland Casualty Co.*, 146 F 2d 633 (CA 3, 1944), certiorari denied, 325 U.S. 855 (1945). What petitioners actually desire is to expunge the *opinion* of the Court of Appeals. (App. this Brief, p. 7a). Vacating the judgment will not do that.

No injustice would be worked by denying the petition for certiorari without a vacatur. The Federal Power Commission has, in this case, exercised jurisdiction which is unassailable as the matter now stands. In the exercise of that jurisdiction, the Com-

mission has done that which the petitioners seek with respect to preference provisions. All the water available for development is now licensed for development subject to preference rights in complete harmony with the law and petitioners' claims. There is no possibility of spawning legal consequences in the future which are adverse to petitioners. In fact, what they now have is made unassailable by leaving undisturbed the judgment below and denying the petition.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX 1

Extract f.om Federal Power Act

"Sec. 4. General powers of commission

The Commission is hereby authorized and empowered—

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect

shall be made by the commission and shall become a part of the records of the Commission: *Provided further,* That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection."—16 U.S.C. § 797(e).

APPENDIX 2

Excerpts from Amendment No. 2 to Power Authority's Application for License

Project No. 2216

AMENDMENT No. 2

to

APPLICATION

of

POWER AUTHORITY OF THE STATE OF NEW YORK

To The

FEDERAL POWER COMMISSION

For a License under Section 4 (e) of the Federal Power Act and Public Law 85-159, approved August 21, 1957, for a Power Project to be located in Niagara County, State of New York

FOR DEVELOPMENT

of the

NIAGARA RIVER

August 28, 1957

Power Authority of the State of New York hereby further amends the above described application filed with the Federal Power Commission on August 20, 1956, and first amended on September 19, 1956, as follows:

(1) Change the title page to read as follows:

APPLICATION

of

POWER AUTHORITY OF THE STATE OF NEW YORK

To The

FEDERAL POWER COMMISSION

For a License under Section 4 (e) of the Federal Power Act and Public Law 85-159, approved August 21, 1957, for a Power Project to be located in Niagara County, State of New York

FOR DEVELOPMENT

of the

NIAGARA RIVER

August 20, 1956

(2) Delete the first paragraph on page 1 and substitute the following:

1. Power Authority of the State of New York, having its office and principal place of business at The Coliseum Tower, 10 Columbus Circle, New York 19, N. Y., hereby makes application to the Federal Power Commission for a license to authorize, under Section

4 (e) of the Federal Power Act and Public Law 85-159, approved August 21, 1957 (Exhibit A-1, hereinafter referred to as "Public Law 85-159"), the construction, operation and maintenance of the project works described herein. . .

* * * * * * * * *

(7) Following the second paragraph on page 8, beginning after line 19, insert the following:

Sections 1 (b) (1) and 1 (b) (2) of Public Law 85-159 provide as follows:

"(b) The Federal Power Commission shall include among the licensing conditions * * * the following:

(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and non-profit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagree-

ment between the licensee and the power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided*, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection."

The Attorney General of the State of New York has officially informed Applicant that these conditions are consistent with the provisions of the Power Authority Act, and Applicant will accept them.

(8) Delete the third full paragraph on page 10 (lines 24 through 40).

(9) Insert at the beginning of paragraph 12 on page 13 the following paragraphs:

Public Law 85-159 provides that seven specific licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, be included in the license to be issued under the law. These conditions include those mentioned above.

Subdivision 3 of Section 1005 of the Power Authority Act specifically permits Applicant to accept a license issued by the Federal Power Commission and "the terms and conditions therein imposed pursuant to law."

The Attorney General of the State of New York has given his opinion that all of the conditions required by Public Law 85-159 are consistent with the provisions of the Power Authority Act (Exhibit A) and that Applicant may accept a license containing all of such conditions. Applicant is willing to do so.

IN WITNESS WHEREOF, Applicant has caused its name to be hereunder signed by Robert Moses its Chairman and its corporate seal to be hereto affixed by W. S. Chapin, its General Manager and Secretary, each thereunto duly authorized, this 28th day of August, 1957.

POWER AUTHORITY OF THE STATE OF NEW YORK

By R. MOSES
Chairman

(SEAL)

Attest: W. S. CHAPIN,
General Manager and Secretary

APPENDIX 3

Letter of Petitioner's Counsel

ELY, MCCARTY AND DUNCAN

COUNSELORS AT LAW

Tower Building
Washington 5, D. C.

Telephone

Metropolitan 8-6474
Teletype WA 245

Northcutt Ely
Robert L. McCarty
C. Emerson Duncan, II
Charles F. Wheatley, Jr.

September 11, 1957

Scott B. Lilly, Esquire
Power Authority of the State of New York
The Coliseum Tower
10 Columbus Circle
New York 19, New York

Dear Mr. Lilly:

This will confirm our telephone conversation of September 10. I am enclosing for your information a copy of the designation of record which was filed yesterday with the Clerk of the Court of Appeals. Another copy was mailed yesterday to Mr. Moore.

As I explained to you, our principal reason for wishing to see the decision of the Court of Appeals vacated is the doubt cast by the language of the opinion on the validity of treaty reservations not necessarily restricted to the 1950 Treaty with Canada. We have deemed it necessary, therefore, to petition for a writ of certiorari for the express purpose of requesting the Supreme Court to declare the judgment of the Court of Appeals moot, and to vacate the opinion.

We have noted that the Power Authority has amended its application for a license to provide that the application is made under the provisions of Public Law 85-159. The Commission's decision to expedite the issuance of the license is to be commended.

I look forward to seeing you in Washington when the hearings on Docket R-129 reconvene.

Cordially,

C. EMERSON DUNCAN II
For Ely, McCarty and Duncan

CED:mw
Enclosure

APPENDIX 4

Order of Federal Power Commission Issuing License

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

Project No. 2216

In the Matter of

Power Authority of the State of New York

ORDER ISSUING LICENSE (MAJOR)

(Issued September 19, 1957)

Application was filed August 20, 1956, as amended September 19, 1956 and September 9, 1957, by Power Authority of the State of New York, (Applicant) for a license under Section 4 (e) of the Federal Power Act (hereinafter referred to as the Act) and Public Law 85-159, 85th Congress, approved August 21, 1957 (71 Stat. 401), for pro-

posed Project No. 2216 (Niagara Project) to be located on the Niagara River, a navigable waterway of the United States and an international boundary stream, in the County of Niagara, the City of Niagara Falls and the Towns of Niagara and Lewiston—all within the State of New York.

Applicant proposes to construct and operate hydroelectric facilities to utilize all of the waters of the Niagara River which it is permissible to divert for power purposes in the United States under the terms of the February 27, 1950 treaty between the United States and Canada. (1 UST 694).

By our orders issued October 25 and November 1, 1956, and September 12, 1957, respectively, intervention was granted to: Niagara Mohawk Power Corporation, Attorney General of the State of New York on behalf of the people of New York, National Rural Electric Cooperative Association and 28 rural electric cooperative associations distributing electric power in the States of New York, Ohio and Pennsylvania, Rochester Gas and Electric Corporation, County of Niagara, New York, City of Niagara Falls, New York, American Public Power Association, Municipal Electric Utilities Association of New York State, City of Jamestown, New York, Town of Lewiston, New York and International Paper Company of New York, New York.

By our order issued September 12, 1957, we have scheduled a public hearing to be held commencing October 1, 1957 respecting the issues raised by Interveners City of Niagara Falls, Town of Lewiston, and County of Niagara, New York, concerning their opposition to the water conduits and the reservoir area of the project as proposed by Applicant, and respecting the issues raised by Intervener International Paper Company concerning its claim to water rights involved in *Federal Power Commisison* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239.

The Secretary of the Army and the Chief of Engineers in reporting on the application have recommended certain terms and conditions for inclusion in the license, as hereinafter provided.

The Secretary of the Interior has not submitted his report on the application but we understand it will be filed in the near future. Any conditions he may recommend for inclusion in the license will relate to conservation of fish and wildlife resources and may be considered later.

Public Law 85-159, supra authorizes and directs the Commission to issue a license to Applicant for the construction and operation of the Niagara Project under the terms thereof and those of the Federal Power Act, and subject to certain special conditions hereinafter included in this license.

The Commission finds:

(1) The proposed project would affect navigable waters of the United States.

(2) The proposed project would consist of:

(a) All lands constituting the project area and enclosed by the project boundary or the limits of which are otherwise defined, and/or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by the Licensee or by the United States; such project area and project boundary being more specifically shown and described by certain exhibits filed by Applicant, the approval of which by the Commission shall be as hereinafter provided.

(b) All project works comprising:

(1) A concrete intake and gate structure in and near Niagara River about three miles above the Falls;

(2) A water conveyance system about four miles long extending from the intake gate to a pumping-generating plant and a regulating reservoir in the Town of Lewiston;

(3) A pumping-generating plant in the Town of Lewiston with twelve pump-generator units rated 20,000 kilowatts each as generators;

(4) A regulating reservoir in the Town of Lewiston;

(5) A water conduit from the pumping-generating plant and regulating reservoir to the main Lewiston generating plant;

(6) The main Lewiston generating plant in the Town of Lewiston with forebay, penstocks, thirteen 150,000 kilowatt generating units, step-up transformers, and high-tension lines to the switchyard;

(7) A switchyard near the pumping-generating plant;

the location, nature, and character of which project works are more specifically shown and described by certain exhibits filed by Applicant.

(c) All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also, all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(3) The Applicant is a corporate municipal instrumentality, a political subdivision of the State of New York, organized and existing under the laws of the State of New York, and is a municipality within the meaning of Section 3 (7) of the Act; and it has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project.

(4) Public notice of the application has been given.

(5) The proposed project will not affect any Government dam, and the issuance of a license therefor, as hereinafter provided, will not affect the development of any water resources for public purposes which should be undertaken by the United States.

(6) Applicant has submitted satisfactory evidence of its financial ability to construct the proposed project.

(7) The proposed project is best adapted to a comprehensive plan for development of the Niagara River for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes.

(8) The installed horsepower capacity of the proposed project hereinafter authorized for the purpose of computing the capacity component of the administrative annual charges is 2,920,000 horsepower. The energy to be generated at the proposed project will be marketed in accordance with the provisions of Public Law 85-159, *supra*.

(9) The amount of annual charges to be paid under the license for the purpose of reimbursing the United States for the cost of administration of Part I of the Act as hereinafter provided is reasonable.

(10) It is desirable to reserve for future Commission determination what transmission lines, if any, should be included in this license.

(11) The project exhibits filed with the application are being revised. Applicant should be required to file revised project exhibits as hereinafter provided.

The Commission orders:

(A) This license is issued to Power Authority of the State of New York (hereinafter referred to as the Licensee) under the provisions of Section 4 (e) of the Federal Power Act and Public Law 85-159 (71 Stat. 401), for a period of 50 years, effective as of September 1, 1957, for the construction, operation and maintenance of the Niagara Project No. 2216, located on the Niagara River, a navigable water of the United States and an international boundary stream, in the vicinity of Niagara Falls, for the purpose of developing all of the waters of the Niagara River which it is permissible to divert for power purposes in the United States under the terms of the 1950 treaty between the United States and Canada, subject to the terms and conditions of the Federal Power Act, and the aforementioned Public Law 85-159, both of which are incorporated by reference as part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act, and subject to the applicable provisions of the aforementioned 1950 treaty between the United States and Canada.

(B) This license is also subject to the terms and conditions set forth in Form L-4, December 15, 1953, entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters of the United States" (16 FPC 1284), which terms and conditions, described as Articles 1 through 18 therein, except for Articles 7, 14 and 15 thereof, and except that the Chief of Engineers, Department of the Army, shall have supervision of stream gaging operations under Article 6 thereof in lieu of the District Engineer of the United States Geological Survey, are attached hereto and made a part hereof; and

subject to the following special conditions set forth herein as additional articles:

Article 19. The Licensee shall pay to the United States the following annual charge:

For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, one (1) cent per horsepower on the authorized installed capacity (2,920,000 horsepower) plus two and one-half (2½) cents per 1,000 kilowatt-hours of gross energy generated by the project during the calendar year for which the charge is made.

Article 20. In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the Licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and non-profit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this article is sold to utility companies organized and administered for profit, the Licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

Article 21. The Licensee shall make a reasonable portion of the project power subject to the preference provisions of Article 20 available for use within reasonable economic transmission distance in neighboring States, but this article shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States.

The Licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the Licensee and the Power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided*, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the Licensee shall deal only with such agency in that State. The arrangements made by the Licensee for the sale of power to or in such States shall include observance of the preferences in Article 20.

Article 22. The Licensee shall contract, with the approval of the Governor of the State of New York pursuant to the procedure established by New York law, to sell to the Licensee of Federal Power Commission Project No. 16 for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred forty-five thousand kilowatts of the remaining project power, which is equivalent to the amount produced by Project No. 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by Project No. 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from Project No. 16 was utilized: *Provided*, That the Licensee of Project No. 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both Licensees and approved by the Federal Power Commission which shall include the following (a) the Licensee of Project No. 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or from the State of New York, except just compensation for tangible property and right-of-way actually taken, and

(b) without limiting the generality of the foregoing, the Licensee of Project No. 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian raights, diversionary rights, or other rights relating to the diversion of use of water, whether founded on legislative grant or otherwise.

Article 23. The Licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in Article 20, and to the neighboring States in accordance with Article 21.

Article 24. In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the Licensee, consistent with Article 20 and 22.

Article 25. The Licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, may construct a scenic drive and park on the American side of the Niagara River, near the Niagara Falls, pursuant to a plan the general outlines of which shall be approved by the Federal Power Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the Licensee's net investment in said project: *Provided*, That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the Licensee's net investment shall not exceed $15,000,000.

Article 26. The Licensee shall pay to the United States and include in its net investment in the project herein au-

thorized the United States share of the cost of the construction of the remedial works, including engineering and economic investigations, undertaken in accordance with article II of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, whenever such remedial works are constructed. The Licensee shall also pay to the United States the United States share of the cost of operation, maintenance and replacements of the remedial works. The amounts to be paid under this article shall be hereafter determined by the Commission.

Article 27. The Licensee shall submit for Commission approval Exhibits F, J, and K, prepared in accordance with the Commission's rules and regulations, within two years from the effective date of this license.

Article 28. The Commission reserves the right to determine at a later date what transmission lines shall be included in this license as part of the project works.

Article 29. The Licensee shall commence construction of the project within one year from the effective date of this license, shall thereafter in good faith and with due diligence prosecute the construction, and complete the project within six (6) years from the effective date of this license.

Article 30. The Licensee, prior to starting construction of any portion of the project which would affect the operation of the existing terminal at the foot of Hyde Park Boulevard, shall: construct in the general vicinity of the intake structure, a terminal for the receipt of water borne commerce; excavate a channel alongside the terminal and connecting to the Federal channels in Niagara River to a depth to fully utilize the depths provided in the Federal channels; construct a suitable mainland access to the terminal; submit for Commission approval Exhibit L, general design drawings for these works in accordance with the Commission's rules and regulations; and transfer the

completed terminal facilities to the City of Niagara Falls without charge.

Article 31. The Licensee shall construct, operate and maintain or shall arrange for the construction, operation and maintenance of such fish facilities or protective devices for the purpose of conserving fish and wildlife resources, and comply with such reasonable modifications in project structures and operations in the interest of conserving fish and wildlife resources as may be prescribed hereafter by the Commission upon recommendation of the Secretary of the Interior.

Article 32. The Licensee shall at such times as the Commission may direct and to the extent that it is economically feasible to do so, and after notice and opportunity for hearing install additional units in the Lewiston and/or Tuscarora plants and make other project changes as may be found by the Commission to be best adapted to a comprehensive plan for improving and developing the Niagara River.

Article 33. The Licensee shall file revised Exhibit L drawings within 6 months from the issuance of this order and shall not begin construction of the project structures until the Commission approves the Exhibit L drawings for such structures.

Article 34. The final design of the intake structure shall be based on model tests.

Article 35. Licensee shall reimburse the United States for the cost of any model tests considered necessary by the Chief of Engineers to determine the effect of the intake structure together with the approach channel on navigation in the Niagara River.

(C) This order shall become final thirty (30) days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313 (a) of the Act, and

failure to file such an application shall constitute acceptance of this license. In acknowledgement of the acceptance of this license, it shall be signed for the Licensee and returned to the Commission within sixty (60) days from the date of its issuance.

By the Commission.

JOSEPH H. GUTRIDE,
Secretary.

IN TESTIMONY OF ACCEPTANCE of all the provisions and conditions of the license for Project No. 2216, Power Authority of the State of New York, this day of , 19 , has caused its corporate name to be signed by its Chairman, and its corporate seal to be affixed hereto and attested by its Assistant Secretary, pursuant to a resolution of its Board of Trustees duly adopted on the day of 19 , a certified copy of the record of which is attached hereto.

POWER AUTHORITY OF THE STATE OF NEW YORK

By

Chairman

Attest:

Assistant Secretary

(Executed in quadruplicate)

APPENDIX 5

Extract from Brief of Petitioners Before the Court of Appeals

The following is petitioners' statement of interest as it appears on pages 2 and 3 of the brief:

"THE INTEREST OF THESE INTERVENORS

"The American Public Power Association and the City of Jamestown, New York, sought and were granted leave to intervene in this cause in order to represent public power users in the marketing area serviceable by the proposed power development. One hundred nineteen public power agencies in Ohio, Pennsylvania, and New York, within transmission distance of 300 miles from the proposed project, are members of the American Public Power Association.

The intervenors desire the immediate development of the additional power potential made available to the United States by the 1950 Treaty with Canada. They desire, however, that that development be authorized by legislation which will follow the historic congressional pattern of providing preferences to local public agencies in the marketing of the power produced by a public development. The underlying difference between these intervenors and the Power Authority of the State of New York is the latter's persistent refusal to recognize in these smaller public agencies the preference it seeks for itself as just such a public agency under section 7 of the Federal Power Act. We are thus interested in sustaining the validity of the Senate's 1950 reservation, enacted, we think, for the very purpose of reserving to Congress the power to protect these same public agencies. Such agencies, within a transmission distance of 300 miles from this project, in Pennsylvania, Ohio, and New York, would require about 575,000 kilowatts, of the project's potential of 2,000,000 kilowatts, if all of these agencies took all of their power requirements from the Niagara project. Their present requirements would be much less, since some of these agencies already own some producing capacity. Their size is small but the principle involved is very large, and can be protected without hardship to the project."

LIBRARY
SUPREME COURT, U. S.

FILED
OCT 30 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 477

AMERICAN PUBLIC POWER ASSOCIATION, THE CITY OF JAMESTOWN, NEW YORK, HANCOCK-WOOD ELECTRIC COOPERATIVE, INC., OF NORTH BALTIMORE, OHIO, AND NORTHWESTERN RURAL ELECTRIC COOPERATIVE ASSOCIATION, INC., OF CAMBRIDGE SPRINGS, PENNSYLVANIA, *Petitioners*,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE STATES OF CALIFORNIA, COLORADO, NEVADA, NEW MEXICO, TEXAS, UTAH, AND WYOMING, AS AMICI CURIAE

(See List of Attorneys on page 2 of cover)

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The Niagara Treaty, 1 *United States Treaties and Other International Agreements* 694 (1950) 6, 7

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 477

AMERICAN PUBLIC POWER ASSOCIATION, THE CITY OF JAMESTOWN, NEW YORK, HANCOCK-WOOD ELECTRIC COOPERATIVE, INC., OF NORTH BALTIMORE, OHIO, AND NORTHWESTERN RURAL ELECTRIC COOPERATIVE ASSOCIATION, INC., OF CAMBRIDGE SPRINGS, PENNSYLVANIA, *Petitioners,*

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE STATES OF CALIFORNIA, COLORADO, NEVADA, NEW MEXICO, TEXAS, UTAH, AND WYOMING, AS AMICI CURIAE

The States of California, Colorado, Nevada, New Mexico, Texas, Utah, and Wyoming, through their respective Attorneys General join herein in respectfully requesting that the Court favorably consider the Petition for Certiorari filed in this case to the end that the decision of the court below be reviewed

as to its merits; or if rendered moot by recently enacted legislation or any other circumstances, that it be vacated.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not reported but is printed as Petitioners' Appendix A, pages 1a to 29a.

INTEREST OF THE AMICI CURIAE

The States of California, Colorado, Nevada, New Mexico, Texas, Utah, and Wyoming, who join together in this brief, all depend in large measure upon the waters of the Colorado River System or the Rio Grande River System for the support of their respective economies. Certain waters of these two river systems were the subject of an international treaty between the United States and Mexico effective as of November 8, 1945. (U. S. Treaty Series 994, 59 Stat. 1219 (1945).) The Treaty, signed by the negotiators of the two Nations on February 3, 1944, allotted certain waters of the Rio Grande between the two countries (Article 4), and guaranteed the delivery to Mexico of certain waters of the Colorado River "from any and all sources" (Article 10). On April 18, 1945, following extended debate, the Senate gave its advice and consent to the Treaty only after first adopting 11 reservations (lettered (a) to (k)), and expressly stating:

> ". . . .that these understandings will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will in effect form a part of the treaty. . . ." (Resolution of Ratification, U. S. Treaty Ser. No. 994, 59 Stat. 1219, (1945).)

The President on November 1, 1945, ratified the treaty subject to the Senate reservations.

On November 8, 1945, the instruments of ratification of the treaty and protocol were exchanged, and a protocol of exchange of instruments was signed and announced, which recited a stipulation in the Mexican resolution of ratification that:

> ". . . the Mexican Senate refrains from considering, because it is not competent to pass judgment upon them, the provisions which relate exclusively to the internal application of the treaty within the United States of America and by its own authorities, and which are included in the understandings set forth under the letter (a) in its first part to the period preceding the words 'It is understood' and under the letters (b) and (c)." (Protocol of Exchange, U. S. Treaty Ser. No. 994, 59 Stat. 1219 (1945).)

On November 27, 1945, the President of the United States issued a proclamation which recited all of the Senate reservations, as well as the Mexican resolution above cited, and proclaimed the treaty in force as from November 8, 1945.

The United States Senate reservations to the Mexican Water Treaty were designed to protect domestic water users within the States depending on the waters of the respective river systems. Reservation (c) provides:

> "(c) That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of

water to users within the territorial limits of any of the individual States."*

The court below, after concluding that the Canadian acceptance of the reservation to the Niagara Treaty "was not so much an acceptance as a disclaimer of interest," held that:

> ". . . The disposition of the United States share of the water covered by this treaty was, even apart from the reservation, 'something which we in the United States must settle under our own procedures and laws.' The reservation, therefore, made no change in the treaty. It was merely an expression of domestic policy which the Senate attached to its consent." (Appendix A to the Petition, p. 6a.)

---

* Reservation (a) provides (in part):

> "(a) That no commitment for works to be built by the United States in whole or in part at its expense, or for expenditures by the United States, other than those specifically provided for in the treaty, shall be made by the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, the United States Section of said Commission, or any other officer or employee of the United States, without prior approval of the Congress of the United States. . . ."

Reservation (b) provides:

> "(b) Insofar as they affect persons and property in the territorial limits of the United States, the powers and functions of the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, the United States Section of said Commission, and any other officer or employee of the United States, shall be subject to the statutory and constitutional controls and processes. Nothing contained in the treaty or protocol shall be construed as impairing the power of the Congress of the United States to define the terms of office of members of the United States Section of the International Boundary and Water Commission or to provide for their appointment by the President by and with the advice and consent of the Senate or otherwise."

The court below denied effect to the reservation and sustained the jurisdiction of the Federal Power Commission which the Senate's reservation would have specifically withheld. The decision of the court below in thus invalidating the Senate reservation to the Niagara Treaty would also place in doubt the validity of the reservations to the Mexican Water Treaty, if left standing as the law of the land. The Power Authority so argued below. (See *infra* pp. 6-7) This would be to the direct prejudice of the States joining in this brief, for whose protection those reservations were expressly designed.

ARGUMENT

1. The decision of the court below should be reversed or vacated to remove it as a legal precedent for the invalidation of the reservations to the Mexican Water Treaty.

Consent by the United States Senate to the Mexican Water Treaty was conditioned upon the incorporation in the treaty of "reservations" which qualified the domestic powers of the Federal Government to interfere with the administration of water rights by the States in the respective river basins, under the guise of the treaty as a domestic enabling act,* without supplemental legislation by act of Congress. This was a beneficial exercise by the Senate of its designated role in the treaty-making process under the Constitution. The reservations were designed to safeguard the States against any inherent self-executing domestic operation of the treaty disruptive of established federal-state relationships in the field of water resources—relationships traditionally left to the deliberation of the States and the full Congress under other Constitu-

* Cf. *Foster* v. *Neilson*, 2 Pet. 253, 314 (U.S. 1829); *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888).

tional procedures specifically designed for the problems of domestic federalism, such as interstate compacts, reciprocal state-federal legislation, or legislation by the full Congress under the commerce clause.

The decision of the court below in permitting the Niagara Treaty to stand, but striking down the reservation thereto which had been adopted by the Senate and President as an integral part of the treaty, assumes that the treaty, without the reservation, would have received the necessary consent of the Senate. Clearly, such an assumption would be unjustified in the case of the reservations to the Mexican Water Treaty, for the Senate expressly conditioned its consent to the whole treaty upon the reservations forming "a part of the treaty." However, the rationale of the decision below invalidating the Niagara Treaty reservation even though formally "accepted" by the Canadian Government, would *a fortiori* imperil the Mexican Treaty reservations which the Mexican Government "refrained from considering." Counsel for the respondent Power Authority expressly so argued before the Federal Power Commission:

> "COMMISSIONER CONNOLE: What about the references to the Mexican Water Treaty which provide the means by which the Government will expend funds to build the works—
>
> "MR. JESSUP: I think, Mr. Commissioner, as you yourself pointed out in the discussion of that this morning, in that case Mexico definitely refused to accept certain of the reservations which they said were of solely domestic import to the United States.
>
> "The President, in his proclamation referred to the fact that Mexico accepted the reservations only

in so far as they affected the rights and obligations of Mexico and not otherwise.

"It seems to me clear that if you have a provision which is suggested from our side after the original treaty is signed, and the other party says, 'We don't accept this; we don't deal with this at all because it doesn't affect us', it is impossible to conclude that that provision not accepted by the other party is part of the treaty, because surely you must have mutuality.

"COMMISSIONER CONNOLE: In other words, you would contend that these terms in the Mexican Water Treaty are as invalid as the ones which were attached to the Niagara treaty?

"MR. JESSUP: Yes, indeed, Mr. Commissioner." (Transcript of Oral Argument in *Power Authority of the State of New York* v. *Federal Power Commission*, pp. 151-152.)

Similarly in their brief on appeal to the Court of Appeals below, the Power Authority concluded that the reservations to the Mexican Treaty "were not part of that treaty." (Brief, p. 35.)

In the light of that argument, note the language of the court below, speaking of the reservations to the Niagara Treaty which it struck down (Appendix A to the Petition, p. 7a):

". . . All that the Senate sought to make executory was the purely municipal matter of how the American share of the water was to be exploited.

"A party to a treaty may presumably attach to it a matter of purely municipal application, neither affecting nor intended to affect the other party. *But such matter does not become part of the treaty.* . . ." (Emphasis is the Court's.)

2. The decision below should be reversed or vacated because of its importance as a disruptive precedent in the administration and adjudication of water rights in the Colorado River Basin.*

The reservations to the Mexican Water Treaty must be viewed as part of the intricate mosaic of federal-state relationships on the Colorado River developed over the past half century.

The Colorado River Compact signed in 1922, which was the result of many years of controversy and negotiation, contained detailed provisions for the sharing of any future Mexican Treaty among the States of the Upper and Lower Colorado River Basins (Article III (c)). Subsequently, the Boulder Canyon Project Act of 1928 (45 Stat. 1057), the product of over ten years of debate and controversy in the Congress, closely defined the Federal Government's powers over the waters of the river system. Section 13(b) provides:

> "(b) The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact."

When the Mexican Water Treaty was negotiated in 1944, the "reservations" thereto were proposed by the affected States in the Senate to tailor the treaty to the existing "law of the river". The reservations were carefully designed by the Senate to circumscribe any assertion of power by the Federal Government, based

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* The State of Texas is not affected by the Colorado River Compact or the Boulder Canyon Project Act problems referred to here.

on the treaty as self-executing domestic legislation, which would interfere with the existing framework of the Colorado River Compact and the Boulder Canyon Project Act, without a special act of Congress.

The meaning and interpretation of the Colorado River Compact, the Boulder Canyon Project Act, and the Mexican Water Treaty are now at issue in the original action now pending before this Court of *Arizona* v. *California* (Original No. 10), involving the Lower Basin States of Arizona, California, Nevada, New Mexico, Utah and the United States. The United States in its Petition of Intervention in this case "asserts claims, as against the parties to this cause, of rights to the use of water in the Colorado River and its tributaries . . . (b) to fulfill its obligations arising from its international treaties or conventions. . . ." (Petition of Intervention, par. XXX, p. 25.)

The decision of the court below invalidating treaty reservations designed to protect traditional domestic procedures for the solution of domestic problems, if left as an established precedent of Federal law, will have far reaching disruptive consequences in the administration and adjudication of water rights on the Colorado River.

CONCLUSION

The States joining herein as *Amici Curiae* express no opinion as to whether events subsequent to the decision of the court below have rendered it moot. But if so, then, in view of the great importance of the decision as a precedent with respect to intricate problems of federal-state relationships under the Mexican

Water Treaty, the Court should remand and order the judgment of the Court of Appeals below vacated as moot.

Respectfully submitted,

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